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**THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW
TO UNRECOGNISED ENTITIES: THE CASE OF TAIWAN**

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ABSTRACT

Traditionally, only States are considered as duty-bearers under international human rights law. Fundamental human rights guarantees have been conceived as standards of legal protection for individuals against the abuse of States. However, with the emergence of various non-State actors, States are no longer the only entities who may interfere with the enjoyment of human rights. The obligations of certain categories non-State actors under international human rights law have been much studied, but the application of international human rights law to “unrecognised entities”, who fulfil the traditional criteria of statehood and have achieved *de facto* independence but are not generally recognised as States by the international community, have received relatively limited scholarly attention. This thesis aims to fill this gap and examine whether existing rules of international human rights law, especially those concerning non-State actors, provide any basis for such application.

Special emphasis will be placed on the Republic of China (ROC, Taiwan) as an example of an unrecognised entity. From the birth of the United Nations, the ROC government participated in human rights-related work within the organisation. Yet, after the adoption of General Assembly Resolution 2758, which recognised the representatives of the government of the People’s Republic of China as the lawful representatives of China, the ROC’s signatures and ratifications of international treaties are no longer recognised, and Taiwan’s recent attempts to ratify/accede to international human rights treaties have been unsuccessful. Questions arise whether Taiwan is bound by these treaties and non-treaty rules of international human rights law. It is envisaged that an examination of theories and practice regarding the application of international human rights law to unrecognised entities will inform the case study of Taiwan and contribute to the development of arguments justifying the application of international human rights law to Taiwan.

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CHAPTER 1

INTRODUCTION

I. Background

International human rights law, like other branches of international law, traditionally only regarded States as subjects to whom the law applied and who bore the duty to perform certain obligations.¹ This State-centred characteristic of international human rights law may be traced back to the fact that the current international human rights regime² was developed in response to the atrocities of the Second World War.³ Human rights in international law have traditionally been conceived as “fundamental guarantees standards of legal protection for individuals against the power, and particularly, against the abuse of power of states”.⁴ Even in situations where the interference with the enjoyment of human rights is caused by non-State actors, this is likely to be considered as a breach of a State’s obligation to discharge its obligation to secure the rights of individuals within its jurisdiction.⁵

This statist approach raises certain concerns. Firstly, determining whether an entity is a State is not always an easy task. There have long been controversies and debates surrounding the criteria required for statehood

¹ Robert McCorquodale, ‘Non-State Actors and International Human Rights Law’ in Sarah Joseph and Adam McBeth (eds), *Research Handbook on International Human Rights Law* (Edward Elgar 2010) 97, 100.

² The term “international human rights regime” is meant to include the system and institutions established by international human rights treaties, as well as organs of international organisations tasked with human rights-related functions.

³ Zehra F Kabasakal Arat, ‘Looking beyond the State But Not Ignoring It: A Framework of Analysis for Non-State Actors and Human Rights’ in George J Andreopoulos, Zehra F Kabasakal Arat, and Peter H Juviler (eds), *Non-State Actors in the Human Rights Universe* (Kumarian Press 2006) 3.

⁴ August Reinisch, ‘The Changing International Legal Framework for Dealing with Non-State Actors’ in Philip Alston (ed), *Non-State Actors and Human Rights* (OUP 2005) 37-38.

⁵ Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006) 26. See also Robert McCorquodale and Rebecca La Forgia, ‘Taking off the Blindfolds: Torture by Non-State Actors’ (2001) 1 Human Rights L Rev 189, 198-203. See also Robert McCorquodale and Penelope Simons, ‘Responsibility beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law’ (2007) 70 Modern L Rev 598, 624.

and how those criteria should be interpreted.⁶ This creates confusion as to whether entities whose statehood is contested bear obligations under international human rights law. Secondly, even if an entity fulfils the criteria of statehood, it is still possible that it will not be recognised as a State by other States in the international community. This lack of recognition may result in a disputed legal status, and the entity may face difficulties in participating in international organisations and treaties, which further leads to doubts as to whether such an entity is bound by international human rights law in the same manner as States.⁷ Thirdly, the State-centred focus begs the question of international human rights law's applicability to non-State actors, especially considering the emergence of non-State actors in recent decades and the increase in their importance in the international community and influence over rights-holders. It may be argued that States are no longer the sole duty-bearers under international human rights law, and it has even been suggested that "nothing in human rights theory ... precludes the imposition of legal obligations on actors other than States".⁸ However, the issues of whether different categories of non-State actors have obligations under international human rights law and the scope of those obligations remain to be explored.⁹

These concerns are of particular relevance in the discussion regarding the applicability of international human rights law to one specific category of entities: those who are not recognised as States but display State-like

⁶ See Chapter 2, particularly Section II.A.

⁷ See Chapter 2, Section II.B.

⁸ Yael Ronen, 'Human Rights Obligations of Territorial Non-State Actors' (2013) 46 Cornell Intl LJ 21, 21. See also Anthony Cullen and Steven Wheatley, 'The Human Rights of Individuals in *De Facto* Regimes under the European Convention on Human Rights' (2013) 13 Human Rights L Rev 691, 727-28.

⁹ Discussions regarding the applicability of international human rights law to non-State actors can be found throughout the thesis, particular Chapter 3, Sections II.B-II.D and Chapter 4, Section III.

attributes and exert influence over individuals in a manner similar to States. These “unrecognised entities”¹⁰ act as *de facto* governing authorities over certain territories and perform functions traditionally assumed by States. It is possible for them to undertake actions which, “if carried out by states, would be regarded as violations of human rights law”.¹¹ However, it is doubtful whether they bear any obligation under international human rights law.

Against this background, among various unrecognised entities, the choice of case study for this thesis is inspired by the unsuccessful attempts of the Republic of China (ROC, Taiwan)¹² to accede to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 2007 and to ratify the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 2009.¹³ After the Chinese Civil War that ended in 1949, the ROC lost control of the Chinese mainland, which formed the majority of the ROC’s territory. The same year saw the establishment of the People’s Republic of China (PRC), and since then the ROC and the PRC governments have been fighting for recognition at the international level. After two decades of diplomatic battle, the United Nations (UN) General Assembly adopted Resolution 2758 in 1971, recognising the representatives of the PRC government as the lawful representatives of China, and gradually, the ROC lost support from other States and is not recognised as a State by the

¹⁰ For a detailed discussion of the term and its criteria, see Chapter 2, Section III.

¹¹ Ronen, ‘Human Rights Obligations of Territorial Non-State Actors’ (n 8) 47.

¹² While “Taiwan” is sometimes used as a geographic term to refer to the island of Taiwan, for the purpose of the thesis, Taiwan and the Republic of China (ROC) are considered as synonyms. The term “the island of Taiwan” is used to refer to the geographic area of the island. Throughout the thesis, “Taiwan” and “the ROC” are used interchangeably, depending on the context. For instance, after 1971, at the international level, “Taiwan” is used more often when addressing issues of human rights. Thus, “Taiwan”, instead of the ROC, is used in this context.

¹³ See Chapter 5, Sections III.A.2 and III.B.2.

majority of other States in the international community.¹⁴ Albeit not generally recognised as a state, the ROC (Taiwan) has been described as a “*sui generis* international person”,¹⁵ a “*de facto* entity with considerable economic presence”,¹⁶ a “non-state territorial entity which is capable of acting independently on the international scene”,¹⁷ an entity that “objectively appear[s] to meet all criteria of statehood”,¹⁸ and a “*de facto* [power] that in practice exercise[s] power or control[s] territory”¹⁹ and “has proto-State international legal identity”.²⁰ With Taiwan being one of the “odd cases” under international law,²¹ its international legal status is disputed,²² and so is the question of whether and to what extent it is bound by international human rights law.

II. Scope and Aim of the Thesis

A. Scope

The aim of this thesis is to explore the application of international human rights law to unrecognised entities, with an emphasis on the case of Taiwan. “Unrecognised entities”, a term that will be defined and discussed in detail in Chapter 2, are entities that display State-like features and functions but are not recognised as States. They are chosen as the focus of the thesis for the following reasons. Firstly, literature on non-State actors and international human rights law seldom examines this group of entities. Other entities such as international organisations, corporations,

¹⁴ For a detailed discussion on the historical background that led to the current status of Taiwan, see Chapter 5, Section II.A.

¹⁵ Colin Warbrick, ‘States and Recognition in International Law’ in Malcolm D Evans (ed), *International Law* (2nd edn, OUP 2006) 230.

¹⁶ Lori F Damrosch and others, *International Law: Cases and Materials* (5th edn, West Academic Publishing 2009) 341.

¹⁷ Malcolm N Shaw, *International Law* (6th edn, CUP 2008) 234-35.

¹⁸ Vaughan Lowe, *International Law* (OUP 2007) 165. See Nii Lante Wallace-Bruce, ‘Taiwan and Somalia: International Legal Curiosities’ (1997) 22 Queen’s LJ 453, 458-63.

¹⁹ James Crawford, ‘Chance, Order, Change: The Course of International Law, General Course on Public International Law’ (2013) 365 Recueil des Cours 9, 266.

²⁰ *ibid* 150.

²¹ Anthony Aust, *Modern Treaty Law and Practice* (2nd edn, CUP 2007) 61.

²² For a detailed discussion on Taiwan’s international legal status, see Chapter 5, Section II.

and armed groups generally receive more attention in scholarly writings that consider the relationship between non-State actors and international human rights law.²³ While much can be found on the status of unrecognised entities under international law,²⁴ little is written on whether they are duty-bearers under international human rights law.²⁵ Therefore, a study to address this gap is necessary. Secondly, the most significant obstacle for the ROC to engage with the international human rights regime is its lack of recognition. Thus, using the lack of recognition as one of the defining criteria for locating the entities to be studied in this thesis and considering the effect of the lack of recognition on the application of international human rights law may provide an insight as to whether Taiwan bears obligations under international human rights law. To answer these questions, it is important to first identify the sources of international human rights law.

1. The Doctrine of Sources of International Law

The doctrine of sources, which are used to identify the primary rules that govern conduct at the international level,²⁶ has been described as the

²³ For instance, unrecognised entities are not among the categories of non-State actors examined in either of the two of the most important publications in this area: Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006) and Philip Alston (ed), *Non-State Actors and Human Rights* (OUP 2005).

²⁴ Examples of such writings include: Jochen Abr. Frowein, 'De Facto Régime' in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law*, instalment 10 (North-Holland 1987); Sergo Turmanidze, 'Status of the *De Facto State* in Public International Law' (LLD thesis, University of Hamburg 2010); Yaël Ronen, 'Entities That Can Be States But Do not Claim to Be' in Duncan French (ed), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (CUP 2013). Additionally, most international law textbooks and texts on recognition address the issue of the legal effect of recognition/non-recognition.

²⁵ It is acknowledged that there have been writings on this topic. Examples of such writings include: Michael Schoiswohl, *Status and (Human Rights) Obligations of Non-Recognized De Facto Regimes in International Law: The Case of 'Somaliland'* (Martinus Nijhoff Publishers 2004); Ronen, 'Human Rights Obligations of Territorial Non-State Actors' (n 8). Although the second publication focuses on territorial non-State actors (non-State actors who "exercise effective territorial control to the exclusion of a government") instead of unrecognised entities, many of the entities discussed in the article fall under the definition of unrecognised entities provided in Chapter 2. For a related discussion in the context of the European Convention on Human Rights, see Cullen and Wheatley (n 8) 691.

²⁶ Harlan Grant Cohen, 'Finding International Law: Rethinking the Doctrine of Sources' (2007) 93 Iowa L Rev 65, 74.

“secondary rules of the international legal order”.²⁷ As international human rights law forms a part of international law, Article 38 of the Statute of the International Court of Justice (ICJ) is the main point of reference in terms of the issue of sources.²⁸ Even though a literal interpretation of Article 38 would suggest that this provision is only meant to indicate the sources of law that the ICJ should apply, it has been overwhelmingly recognised that this provision in fact demonstrates the “universal perception as to the enumeration of sources of international law”.²⁹ According to Article 38(1) of the ICJ Statute, the Court shall apply: a) international conventions; b) international custom; c) the general principles of law recognized by civilized nations; and d) judicial decisions and the teachings of the most highly qualified publicists of the various nations, with the first three being primary sources of international law and the last being subsidiary means to determine international law. Although the meaning and the criteria of each of the sources and the hierarchy among them have been the subject of much debate, the authority of the doctrine of sources itself is seldom challenged.³⁰

Questions have been raised as to whether the list in Article 38(1) is exhaustive, and additional sources have been proposed. Among them are the unilateral acts of States and the practice of international organisations (such as declarations and resolutions adopted by international

²⁷ Niels Petersen, ‘Customary Law without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation’ (2007) 23 Am U Intl L Rev 275, 299.

²⁸ Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993 (ICJ Statute) art 38(1).

²⁹ Shaw (n 17) 71. See also James Crawford, *Brownlie’s Principles of Public International Law* (8th edn, OUP 2012) 22; Hugh Thirlway, ‘The Sources of International Law’ in Malcolm D Evans (ed), *International Law* (4th edn, OUP 2014) 95; Robert Jennings and Arthur Watts (eds), *Oppenheim’s International Law*, vol 1 (Introduction and Part 1) (9th edn, Longman 1992) 24.

³⁰ Harlan Grant Cohen, ‘Finding International Law, Part II: Our Fragmenting Legal Community’ (2012) 44 NYU J Intl L & Pol 1049, 1057; Cohen, ‘Finding International Law: Rethinking the Doctrine of Sources’ (n 26) 74.

organisations).³¹ With regard to the former, a unilateral act of a State can sometimes be considered to create binding legal obligations. The ICJ in the *Nuclear Tests Case* ruled that “[w]hen it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration”.³² International jurisprudence has consistently emphasised that these criteria should be strictly interpreted and the decision to attribute binding force to unilateral declarations of a State should not be made lightly.³³ Doubts have been expressed as to whether the ICJ acknowledged unilateral declarations as a new source of law,³⁴ and criticism of the judgment even suggests that the Court might have acted *ultra vires*, since it is not mandated to decide cases based on sources of law not stipulated in Article 38(1) of the ICJ Statute.³⁵ With regard to the other proposed new source of international law, practice of international organisations, it has been argued that such practice is not in and of itself a primary source of international law, but merely an interpretation of treaties or evidence of custom.³⁶

Although the discussions concerning the abovementioned additional sources present challenges to the doctrine of sources, there have not been generally accepted alternative theories, and the categorisation of Article 38(1) of the ICJ Statute continues to be adopted, including in discussions

³¹ Shaw (n 17) 114-19, 121-22; Crawford, *Brownlie's Principles* (n 29) 42; Thirlway, 'The Sources of International Law' (n 29) 111-14; Jennings and Watts (eds) (n 29) 45-50; David Harris, *Cases and Materials on International Law* (7th edn, Sweet & Maxwell 2010) 45-56; Damrosch and others (n 16) 265-79, 292-98.

³² *Nuclear Tests (Australia v France)* [1974] ICJ Rep 253, para 43.

³³ *ibid* para 44; *North Sea Continental Shelf (Germany v Denmark; Germany v Netherlands)* [1969] ICJ Rep 3, paras 27-28; WTO, *United States: Sections 301-310 of the Trade Act of 1974*—Report of the Panel (22 December 1999) WT/DS152/R, para 7.118; *Case Concerning the Frontier Dispute (Burkina Faso v Mali)* [1985] ICJ Rep 554, para 39.

³⁴ Thirlway, 'The Sources of International Law' (n 29) 112.

³⁵ Alfred P Rubin, 'The International Legal Effects of Unilateral Declarations' (1977) 71 AJIL 1, 29.

³⁶ Hugh Thirlway, *The Sources of International Law* (OUP 2014) 23.

of the sources of human rights obligations.³⁷ Therefore, the sources of international law identified by Article 38(1) still serve as the basis for the examination of the application of international human rights law to unrecognised entities set out in this thesis.

2. Categorisation of Sources Adopted in the Thesis

To study the application of international human rights law to unrecognised entities, this thesis focuses on the primary sources of international law. As explicitly stated in Article 38(1)(d) of the ICJ Statute, “judicial decisions and the teachings of the most highly qualified publicists of the various nations” are “subsidiary means for the determination of rules of law”.³⁸ In other words, they do not in and of themselves create binding rules of international law. Therefore, they will not be examined independently in this thesis.

Although the remainder of Article 38(1) of the ICJ Statute contains three types of sources, this thesis chooses to categorise the sources of law as: international human rights treaties and “general international human rights law”, which is used to refer to all non-treaty rules of international human rights law. Treaty law constitutes the majority of international human rights law³⁹ and merits independent examination, especially considering that the law of treaties and the existing human rights treaties provide comprehensive rules that may help ascertain their applicability to unrecognised entities. Beyond treaties, the category of “general international law” is adopted for the following reasons. Firstly, the term “general international law” is sometimes employed to refer to non-treaty

³⁷ Bruno Simma and Philip Alston, ‘The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles’ (1992) 12 Australian YB Intl L 82, 82; Christine Chinkin, ‘Sources’ in Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran (eds), *International Human Rights Law* (2nd edn, OUP 2014) 77.

³⁸ Statute of the International Court of Justice (n 28) art 38(1)(d).

³⁹ Thirlway, *The Sources of International Law* (n 36) 175.

rules of international law,⁴⁰ and the word “general” denotes the universal application of such rules to all entities with the capacity to possess the relevant rights and obligations.⁴¹ Secondly, while the treaty/custom dichotomy has often been adopted by international legal scholars, human rights obligations of States and non-States actors may arise from other sources of international law, such as general principles of international law.⁴² It has also been argued that as conventional and customary international human rights law do not necessarily meet all the present-day challenges, general principles of international law serve to fill the gap.⁴³ Thus, instead of solely focusing on customary international human rights, the scope of the study includes rules of *general* international human rights law. Lastly, to explore the application of international human rights law to unrecognised entities, the analysis of theories and practice concerning non-State actors and international human rights law is essential. Yet, when this issue is addressed in academic writings or in practice, the language employed is sometimes ambiguous and sources of obligations unspecified. Similarly, while practice has seen references to human rights “violations” of non-State actors, the character of the rules that are violated is usually not provided.⁴⁴ Many examples given in Chapter 4 demonstrate this tendency. Since the obligations often cannot be attributed to specific sources, this thesis chooses to analyse the existence and extent of non-treaty obligations of non-State actors and unrecognised entities in relation to the entire body of general international human rights law.

B. Research Questions

⁴⁰ Eg Clapham, *Human Rights Obligations* (n 5) 87; Nigel Rodley and Matt Pollard, *The Treatment of Prisoners under International Law* (3rd edn, OUP 2009) 64-65.

⁴¹ Clapham, *Human Rights Obligations* (n 5) 87.

⁴² Simma and Alston (n 37); Chinkin (n 37) 84-85.

⁴³ M. Cherif Bassiouni, ‘A Functional Approach to “General Principles of International Law”’ (1989) 11 *Michigan J Intl L* 768, 769.

⁴⁴ Schoiswohl (n 25) 258.

This thesis seeks to explore if and on what basis international human rights law can be applied to unrecognised entities. As explained above, this thesis examines two categories of sources: international human rights treaties and general international human rights law. Due to the differences in their nature, different approaches are taken. In terms of the former, under the law of treaties, for a treaty to enter into force for the parties, the most essential elements are that the parties possess treaty-making capacity and that they express consent to be bound by the treaty.⁴⁵ Therefore, the question of whether unrecognised entities can bear obligations under international human rights treaties is essentially two-fold: whether such entities possess capacity to conclude or participate in international human rights treaties, and how they express consent to be bound by these treaties. As for general international human rights law, considerations are given to the possible bases of its binding force and whether such bases can justify its application to unrecognised entities.

Since Taiwan is chosen among unrecognised entities as the focus of this thesis, an important part of the research questions concerns the relevant practice by and regarding Taiwan. On the one hand, this thesis surveys Taiwan's interactions with the international human rights regime, including Taiwan's participation and attempted participation in international human rights treaties and human rights related work in international bodies, especially those within the UN. On the other hand, this thesis considers whether the practice of other States or international actors reflects their attitudes towards the possibility of applying international human rights law to Taiwan. It is envisaged that an examination of such practice may

⁴⁵ Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Part II; Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (adopted 21 March 1986) UN Doc A/CONF.129/15, Part II.

contribute to the discussion of whether Taiwan should be considered as a duty-bearer under international human rights law.

III. Methodology and Structure

Essentially, the research questions presented above require exploration of what the rules of international law are in relation to the application of international human rights law to unrecognised entities. Thus, the doctrinal approach is the method taken in this thesis. The doctrinal method, or black-letter law, is an approach that seeks to “systematise, rectify and clarify the law on any particular topic by a distinctive mode of analysis to authoritative texts that consist of primary and secondary sources”.⁴⁶ In other words, the method views law as a self-contained discipline and aims to answer research questions using law itself. It is a formal and rule-based approach that examines sources of law in a systematic fashion and employs them in legal analysis and reasoning.⁴⁷

It may be argued that answering the research questions of this thesis with a doctrinal approach might in fact expose the drawbacks of the approach. The approach has been described as limited in scope (since it only concerns the law itself) and even as “intellectually rigid, inflexible and inward-looking”.⁴⁸ Despite the emergence of non-State entities over the past several decades, international law remains highly State-centred. Therefore, finding answers to questions of the role of entities that are not recognised as States or international legal persons under international law might be difficult. However, as demonstrated in subsequent chapters, the

⁴⁶ Mike McConville and Wing Hong Chui, ‘Introduction and Overview’ in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh UP 2007) 4.

⁴⁷ Reza Banakar and Max Travers, ‘Law, Sociology and Method’ in Reza Banakar and Max Travers (eds), *Theory and Method in Socio-Legal Research* (Hart Publishing 2005) 7.

⁴⁸ Douglas W Vick, ‘Interdisciplinarity and the Discipline of Law’ (2004) 31 J L & Soc’y 163, 164.

status of non-State actors in relation to the international human rights regime has received increasing attention both in academic writings and in practice. Theories and rules concerning the human rights obligations of non-State actors can be used to inform the discussions on unrecognised entities.

In exploring the rules of international law concerning the application of international human rights law to unrecognised entities, this thesis takes a positivist approach, as evidenced by the above discussion concerning sources of international law. When describing positivism in the context of international legal theory, Simma and Paulus quote the judgment of the Permanent Court of International Justice (PCIJ) in the *Lotus Case* as the “classic expression” of positivism:⁴⁹

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.⁵⁰

A limit to positivism might lie in the fact that it considers the law of a community as a set of special rules, and the set of these legal rules is exhaustive of the law; in other words, if a certain issue is not covered by such rules, the issue cannot be resolved by applying the law.⁵¹ As this

⁴⁹ Bruno Simma and Andreas L Paulus, ‘The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View’ (1999) 93 AJIL 302, 304.

⁵⁰ *SS Lotus (France v Turkey)* [1927] PCIJ Rep Series A No 9, 18.

⁵¹ Ronald Dworkin, ‘The Model of Rules’ in Dennis Patterson (ed), *Philosophy of Law and Legal*

thesis attempts to answer research questions concerning unrecognised entities, this concern might be plausible considering the State-centred nature of international law. However, it has been argued that with the growing importance of actors other than States at the international level and their impact on the interpretation of international law, the sources of international law are flexible enough to accommodate new developments.⁵² Additionally, even if this thesis eventually finds that, with a positivist understanding of international law, existing rules in fact do not provide an answer to the question of whether international human rights law applies to unrecognised entities, identifying the existence of legal vacuum in this regard may still be a note-worthy conclusion for this thesis.

Following this introductory chapter, the thesis explores the application of international human rights law to unrecognised entities in five further chapters. Chapter 2 identifies the group that is the focus of the thesis: unrecognised entities. As States were traditionally considered to be the sole duty-bearers under international law in general, as well as under international human rights law, the chapter first introduces the notions of international legal personality and statehood. Considering that one important aspect of the initial concept of unrecognised entities is their State-like characteristics, it is envisaged that an examination of the criteria of statehood will help conceptualise the notion of unrecognised entities. Another important aspect is the issue of recognition under international law, and theories and practice concerning State recognition are analysed with a view to contributing to the formulation of the definition of unrecognised entities.

Theory: An Anthology (Blackwell Publishing 2003) 48.

⁵² Simma and Paulus, 'The Responsibility of Individuals' (n 49) 306-08, 316.

After the subject of study of this thesis is identified, the examination of the application of international human rights law to unrecognised entities begins in Chapter 3, with the first category of sources: treaties. The chapter is structured in a manner that reflects the rules of the law of treaties. For a treaty to enter into force for a party as a matter of international law, the parties of the treaty must possess treaty-making capacity and there must be an expression of consent to be bound. Therefore, Chapter 3 first considers the treaty-making capacity of different actors under international law: States, international organisations, insurgents, and other international entities, as well as the rationale behind granting each category of actors such capacity. The findings are then used to formulate potential bases for granting unrecognised entities capacity to conclude or participate in international human rights treaties. This chapter also looks at possible reasons for other States to refuse to acknowledge such capacity and examines their validity. After the discussions concerning treaty-making capacity, the chapter moves on to explore the plausible means for an unrecognised entity to express its consent to be bound by human rights treaties. Throughout the chapter, the nature and characteristics of international human rights treaties are taken into account, as it is not the aim of the thesis to explore the application of international law in general to unrecognised entities.

Chapter 4 turns the focus to general international human rights law. The chapter approaches the question of the application of this body of law to unrecognised entities from three angles. Firstly, the chapter analyses the sources of general international human rights law and the basis of their authority. Secondly, the chapter evaluates the applicability of general international human rights law to certain categories of non-State actors: international organisations, armed groups, and entities created to

administer territories. Thirdly, the chapter introduces relevant practice at the international level acknowledging the applicability of general international human rights law to unrecognised entities. The discussions from all three are then used to formulate theories that potentially justify the application of general international human rights law to unrecognised entities.

Chapter 5 concentrates on the case of one unrecognised entity: the ROC (Taiwan). Chapter 5 first introduces the controversies surrounding the international legal status of the ROC and the historical development contributing to such controversies and then examines why the ROC falls under the definition of unrecognised entities provided in Chapter 2. After establishing that the ROC is an unrecognised entity for the purpose of the thesis, the chapter goes on to apply the arguments and theories developed in Chapters 3 and 4 to the case of the ROC. The validity of possible concerns for acknowledging the applicability of international human rights law to the ROC is also examined.

Chapter 6 concludes the thesis.

CHAPTER 2

**INTERNATIONAL LEGAL PERSONALITY, STATEHOOD,
AND RECOGNITION: THE NOTION OF UNRECOGNISED ENTITIES**

I. Introduction

The notion of “legal persons”, or “subjects”, within a given legal system entails that those entities have the capacity to enjoy certain rights and the duty to perform certain obligations.¹ In the nineteenth century, international law could be described as “the body of rules that States applied in their dealings with one another”, and the State could be considered as “the only actor entitled to appear on the stage of international law”.² In other words, international law only applied to States; individuals or other entities were not part of the international legal community.³ Although it remains true that only States have international legal personality to the fullest extent,⁴ modern international law has seen the emergence of various categories of non-State actor.⁵ It might even be argued that statehood is not an essential condition for an entity to be a subject of international law.⁶

An inter-governmental organisation, for instance, may possess an international legal personality distinct from that of the States that compose it.⁷ Constituent instruments of certain international organisations, such as

¹ Malcolm N Shaw, *International Law* (6th edn, CUP 2008) 195.

² Vaughan Lowe, *International Law* (OUP 2007) 14-15.

³ Roland Portmann, *Legal Personality in International Law* (CUP 2010) 44.

⁴ Anthony Aust, *Handbook of International Law* (CUP 2005) 16.

⁵ PK Menon, ‘The Subjects of Modern International Law’ (1990) Hague YB Intl L 30. See also Philip Alston, ‘The “Not-a-Cat” Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?’ in Philip Alston (ed), *Non-State Actors and Human Rights* (OUP 2005).

⁶ Philip C Jessup, ‘The Subjects of a Modern Law of Nations’ (1947) 45 Michigan L Rev 383, 389; James Crawford, ‘Chance, Order, Change: The Course of International Law, General Course on Public International Law’ (2013) 365 Recueil des Cours 9, 139.

⁷ Hersch Lauterpacht, *International Law and Human Rights* (Stevens & Sons Ltd 1950) 12-19.

the Charter of the United Nations,⁸ often stipulate the need for legal capacity in order to facilitate the fulfilment of their purposes.⁹ This tendency seems to *imply* that member states “intended to confer upon [the institutions] at least a limited degree of international personality”.¹⁰ The ICJ in *Reparation for Injuries Suffered in the Service of the United Nations Advisory Opinion* took the view that the UN is “capable of possessing international rights and duties” and has “objective international personality”.¹¹

Insurgents and belligerents¹² have also been endowed with the capacity to enjoy certain rights and at the same time bear obligations to conduct hostilities in accordance with rules of international humanitarian law¹³ and, arguably, human rights norms.¹⁴ Another contentious category of non-traditional subjects of international law is individuals. Those supporting this categorisation point to the imposition of obligations on individuals involved in armed conflicts and individual responsibility under international criminal law.¹⁵ Modern international agreements also confer rights on

⁸ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art 104. Article 104 reads: “The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes”. Such legal capacity is further elaborated in Article 1(1) of the 1946 Convention on the Privileges and Immunities of the United Nations.

⁹ Jessup (n 6) 391.

¹⁰ Nkambo Mugerwa, ‘Subjects of International Law’ in Max Sørensen (ed), *Manual of Public International Law* (Macmillan 1968) 256.

¹¹ *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 179, 185.

¹² Cassese categorises insurgents and belligerents as the other “traditional subjects” of the international community besides States. Antonio Cassese, *International Law* (2nd edn, OUP 2005) 71.

¹³ Hersch Lauterpacht, ‘The Subjects of the Law of Nations’ in E Lauterpacht (ed), *International Law: Collected Papers of Hersch Lauterpacht*, vol 2 (CUP 1975) 494-95; Leslie C Green, *The Contemporary Law of Armed Conflict* (3rd edn, Manchester UP 2008) 299-300.

¹⁴ Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006) 271-73. See also Andrew Clapham, ‘Human Rights Obligations of Non-State Actors in Conflict Situations’ (2006) 88 Intl Rev Red Cross 491, 491-93.

¹⁵ Eg individual criminal responsibility for war crimes. See Lauterpacht, ‘The Subjects of the Law of Nations’ (n 13) 519-22.

individuals, examples of which include the many conventions concluded by the International Labour Organization and human rights treaties.¹⁶

Certain entities, sometimes termed “*de facto* regimes”, while not recognised as States in fact effectively exercise State-like authority over some territory. Examples of such entities might include Kosovo, the Republic of Somaliland, the Turkish Republic of Northern Cyprus (TRNC), and the Republic of China (ROC; Taiwan).¹⁷ Unlike other non-State actors under international law, these entities generally display a “State-like structure”, and it may be argued that they should be subject to rules that are similar to those applicable to States.¹⁸ While such “unrecognised entities” arguably have the “minimum rights and obligations required to enable ... dealings with other entities”,¹⁹ the scope of international obligations imposed on such entities merits further discussion, and this thesis seeks to clarify whether and, if so, on what basis unrecognised entities may acquire international human rights obligations as well as the extent of such obligations.

Before examining the international legal status of unrecognised entities, this chapter will first revisit the law of statehood and recognition, in order

¹⁶ Cassese, *International Law* (n 12) 146-50. One early example of international agreements conferring rights on individuals is the German-Polish Convention relating to Upper Silesia, which contains provisions protecting the rights of education of minorities. See *Rights of Minorities in Upper Silesia (Minority Schools) (Germany v Poland)* [1928] PCIJ Rep Series A No 15.

¹⁷ For discussion on the status of the ROC (Taiwan), see, eg James Crawford, *The Creation of States in International Law* (2nd edn, OUP 2006) 198-221; Hungdah Chiu, ‘The International Legal Status of Taiwan’ in Jean-Marie Henckaerts (ed), *The International Status of Taiwan in the New World Order: Legal and Political Considerations* (Kluwer Law Intl 1996). See also Chapter 5, Section II.

¹⁸ Michael Schoiswohl, *Status and (Human Rights) Obligations of Non-Recognized De Facto Regimes in International Law: The Case of ‘Somaliland’* (Martinus Nijhoff Publishers 2004) 207. See also Crawford, ‘Chance, Order, Change’ (n 6) 266 (arguing that “with respect to international entities not accepted in an international system of States, there is still the value of analogy, in that those entities as they become more established usually try to act like States and are treated like States”).

¹⁹ *ibid* 211 (quoting Gerald Fitzmaurice, ‘The General Principles of International Law Considered from the Standpoint of the Rule of Law’ (1957) 92 *Recueil des Cours* 1, 31). See also Hermann Mosler, *The International Society as a Legal Community* (Sijthoff & Noordhoff 1980) 48.

to locate these entities among the various actors in the international community. The traditional criteria of statehood will be introduced, and the additional criteria that have been suggested as necessary for the establishment of statehood will be discussed. Different theories regarding the effect of recognition in relation to statehood will also be analysed. The chapter will then attempt to conceptualise the central focus of the thesis, namely the notion of “unrecognised entities”. A definition of “unrecognised entities” will be provided, illustrated by examples of entities that fall within this definition.

II. Statehood and Recognition

A. Criteria of Statehood

Various criteria have been proposed for the determination of statehood.²⁰ There are traditional criteria, as reflected in the 1933 Montevideo Convention on the Rights and Duties of States, that are generally acknowledged as the minimum yardstick that an entity needs to fulfil in order to acquire statehood, but it is unclear whether other conditions are required. Therefore, besides the traditional criteria of statehood, this Section also discusses the additional criteria most commonly reflected in the practice of the international community and examined by scholarly writings, which include independence, permanence and stability, willingness and ability to observe international law, legality of establishment, self-determination, and recognition.

1. Traditional Criteria of Statehood

²⁰ Thomas D Grant, ‘Defining Statehood: The Montevideo Convention and Its Discontents’ 37 (1999) *Columbia J Transnatl L* 403, 417.

The traditional criteria of statehood are set out in Article 1 of the Montevideo Convention. They are: (a) permanent population; (b) defined territory; (c) government; and (d) capacity to enter into relations with other States.²¹ Although signatories to the Convention are limited both in number and geographic representation,²² these requirements have been commonly adopted by States²³ and tribunals,²⁴ and considered as reflecting customary international law by scholars.²⁵ While these criteria have been widely referred to in the context of statehood, they have also been subject to criticisms.²⁶ For instance, Gardiner has expressed concerns that they lead to “bizarre assertion[s] of statehood”, where the criteria are applied as if “a leap can be made from an attempt at their objective application to establishing thereby that an entity is a State for every legal purpose”.²⁷ Nevertheless, considering that these criteria are most often adopted when issues of statehood are involved and that they have been the focus of most scholarly literature in the field, this chapter employs them as benchmarks for determining the legal status of putative States.

²¹ Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19 (Montevideo Convention) art 1.

²² Signatories of the Montevideo Convention are: Argentina, Brazil, Chile, Colombia, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, United States, Uruguay, and Venezuela. Avalon Project: Documents in Law, History and Diplomacy, ‘Convention on Rights and Duties of States (Inter-American); December 26, 1933’ <http://avalon.law.yale.edu/20th_century/intam03.asp> accessed 20 August 2014.

²³ For instance, the US Department of State issued a statement on 1 November 1976, indicating that when judging whether or not to recognize an entity as a State, the United States has traditionally looked to the following facts: “effective control over a clearly-defined territory and population; and organized governmental administration of that territory; and a capacity to act effectively to conduct foreign relations and to fulfil international obligations”. Eleanor C McDowell, ‘Contemporary Practice of the United States Relating to International Law’ (1977) 71 AJIL 337. See also Restatement (Third) of Foreign Relations Law of the United States, § 201 (1987).

²⁴ Eg Badinter Arbitration Commission, Opinion 1 (1991) 92 ILR 165. See Matthew C R Craven, ‘The European Community Arbitration Commission on Yugoslavia’ (1995) 66 British YB Intl L 333, 359 (stating that the conditions adopted by the Commission “closely reflect the classical criteria for statehood” and that reference is clearly made to the Montevideo Convention).

²⁵ David Harris, *Cases and Materials on International Law* (7th edn, Sweet & Maxwell 2010) 92; Martin Dixon, Robert McCorquodale, and Sarah Williams, *Cases and Materials on International Law* (5th edn, OUP 2011) 137.

²⁶ Eg Crawford, ‘Chance, Order, Change’ (n 6) 147-48.

²⁷ In particular, he questioned the stability of the criteria and the lack of clarity regarding the fourth criteria. Richard K Gardiner, *International Law* (Longman 2003) 168-70.

While it is unclear how the four traditional criteria of statehood came about,²⁸ it has been argued that these criteria are grounded on the “principle of effectiveness among territorial units”.²⁹ As there is no central authority in the international community to determine the grant of rights and the imposition of obligations, the notion of effectiveness is used to determine an entity’s capacity to possess rights and fulfil obligations under international law.³⁰

a. Permanent Population

Oppenheim described a permanent population as “an aggregate of individuals who live together as a community though they may belong to different races or creeds or cultures, or be of different colour”.³¹ While a permanent population is required for the establishment of statehood, no minimum number has been prescribed.³² For instance, Nauru, with a population of under 10,000, is a member of the UN (whose membership is limited to States³³), and its status as a State has generally been accepted by the international community.

As for the requirement of permanence, this does not prevent people from migrating across borders.³⁴ Nor do normal changes in the size of the population impede an entity’s claim to statehood.³⁵ However, it has been argued that the viability of an entity as a State might be uncertain if the number of people of which it comprises is very small.³⁶ In order to

²⁸ Grant, ‘Defining Statehood’ (n 20) 416.

²⁹ Crawford, *The Creation of States* (n 17) 46.

³⁰ David Raič, *Statehood and the Law of Self-Determination* (Kluwer Law Intl 2002) 51.

³¹ Robert Jennings and Arthur Watts (eds), *Oppenheim’s International Law*, vol 1 (Introduction and Part 1) (9th edn, Longman 1992) 121.

³² Lori F Damrosch and others, *International Law: Cases and Materials* (5th edn, West Academic Publishing 2009) 308; Crawford, *The Creation of States* (n 17) 52.

³³ Charter of the United Nations (n 8) arts 3, 4.

³⁴ Deon Geldenhuys, *Contested States in World Politics* (Palgrave Macmillan 2009) 8.

³⁵ Menon (n 5) 37.

³⁶ *ibid.*

ascertain the existence of a permanent population, two indicators remain crucial: the population's "intention to inhabit the territory on a permanent basis" and the habitability of that territory.³⁷ The latter would arguably prevent Antarctica from fulfilling this requirement.³⁸ While these two indicators relate to the criterion of defined territory, they should nevertheless be taken into consideration when determining the existence of a permanent population.

b. Defined Territory

Each State needs a territorial base on which it exerts exclusive sovereignty. Yet international law does not set a minimum standard for such an area. There seems to be a general understanding that the geographic size of a State is irrelevant in terms of establishing an effective government and accommodating a permanent population.³⁹ Nor would the lack of territorial contiguity alone deprive an entity its qualification of statehood. In other words, this criterion does not require that the territory be connected. For instance, the territory of the United States (US) includes areas not connected to the 48 states and the District of Columbia, such as Alaska, Hawaii, Guam, etc.⁴⁰ In addition, the requirement of a "defined territory" does not demand that the territorial borders of an entity be absolutely undisputed, and this interpretation is demonstrated in state practice⁴¹ and

³⁷ Raič (n 30) 58-59.

³⁸ Damrosch and others (n 32) 308. On the issue of sovereignty in Antarctica, see Christopher C Joyner, *Antarctica and the Law of the Sea* (Martinus Nijhoff Publishers 1992) 41-67.

³⁹ M H Mendelson, 'Diminutive States in the United Nations' (1972) 21 ICLQ 609, 611. See I A Shearer, *Starke's International Law* (11th edn, Butterworths 1994) 89.

⁴⁰ Damrosch and others (n 32) 309. See also Crawford, *The Creation of States* (n 17) 47; Shearer (n 39) 85-86.

⁴¹ When delivering remarks on the admission of Israel to the UN, Philip Jessup, the then US representative to the Security Council, advocated that "the concept of territory does not necessarily include precise delimitation of the boundaries of that territory". Instead, it denotes that "there must be some portion of the earth's surface which its people inhabit and over which its Government exercises authority". UNSC Official Record (2 December 1948) UN Doc S/PV.383, 11.

jurisprudence⁴² and commonly agreed by scholars.⁴³ Although territorial changes (for instance, secession, accretion, etc.) may change the legal status of the particular part of the territory involved, it would not alter the legal identity of the State.⁴⁴

c. Government

The third criterion requires an effective government or political structure. This is regarded by Crawford as central to a putative State's claim to statehood.⁴⁵ The *Åland Islands Case* provided one of the earliest analyses of this criterion.⁴⁶ The International Committee of Jurists, entrusted by the Council of the League of Nations with the task of investigating the dispute over the Åland Islands, when determining the exact date of the establishment of the Finnish Republic, reported that it did not become a definitely constituted sovereign State "until a stable political organisation had been created, and until the public authorities had become strong enough to assert themselves throughout the territories of the State without the assistance of foreign troops".⁴⁷ However, recent practice suggests that other factors (ie significant international recognition or admission to the UN) could compensate for the lack of effective control over an entire territory.⁴⁸ Moreover, commentators and State practice indicate that a State, once established, does not cease to exist simply because the formerly effective

⁴² Eg *Deutsche Continental Gas-Gesellschaft v Polish State* (German-Polish Mixed Arbitral Tribunal) (1929) 5 ILR 11, 14-15; *North Sea Continental Shelf (Germany v Denmark; Germany v Netherlands)* [1969] ICJ Rep 3, 32.

⁴³ Eg Ian Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 71; James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 128; Shaw (n 1) 199; Aust, *Handbook* (n 4) 17.

⁴⁴ Menon (n 5) 38.

⁴⁵ Crawford, *The Creation of States* (n 17) 55-56.

⁴⁶ For a detailed survey of the Åland Islands question, see James Barros, *The Åland Island Question: Its Settlement by the League of Nations* (Yale UP 1968).

⁴⁷ 'Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Åland Islands Question' (1920) League of Nations Official Journal Spec Supp 3, 8-9.

⁴⁸ Shaw (n 1) 201.

government becomes defunct.⁴⁹ Somalia has often been referred to as an example of a State whose government no longer functions effectively but nevertheless remains a member of the UN and continues to be recognised as a State on the international plane.⁵⁰

d. Capacity to Enter into Relations with other States

This criterion requires an entity to possess "competence, within its own constitutional system, to conduct international relations with other states, as well as the political, technical, and financial capabilities to do so".⁵¹ It has been argued that the capacity to enter into relations with other States is "a consequence of statehood, not a criterion of it".⁵² However, some scholars maintain otherwise.⁵³ Others find the criterion problematic since international actors other than States might possess such capacity, and thus it does not effectively distinguish States from other actors such as international organisations.⁵⁴ The capacity to enter into relations with other States, which could be interpreted as "independence in law from the authority of any other State",⁵⁵ is considered essential for States to engage in international relations.⁵⁶ Nevertheless, practice seems to suggest that a State may transfer control over matters of international relations to another State without compromising the former's statehood.⁵⁷

⁴⁹ Damrosch and others (n 32) 311.

⁵⁰ Eg Harris (n 25) 93-94.

⁵¹ Restatement (Third) of Foreign Relations Law (n 23) § 202(2), Comment e.

⁵² Crawford, *The Creation of States* (n 17) 61. See also Ingrid Detter, *The International Legal Order* (Dartmouth Publishing Co Ltd 1994) 43; Matthew Craven, 'Statehood, Self-Determination, and Recognition' in Malcolm D Evans (ed), *International Law* (4th edn, OUP 2014) 217 (arguing that this criterion "seems to be a conclusion rather than a starting point" for discussions of territorial status).

⁵³ Christian Hillgruber, 'The Admission of New States to the International Community' (1998) 9 EJIL 491, 499-502.

⁵⁴ D P O'Connell, *International Law*, vol 1 (2nd edn, Stevens & Sons Ltd 1970) 285.

⁵⁵ Harris (n 25) 98; Menon (n 5) 41-42.

⁵⁶ Shaw (n 1) 202; Shearer (n 39) 86.

⁵⁷ Liechtenstein, for instance, has transferred control of its national defence and foreign relations to Switzerland but nevertheless retains its statehood. Damrosch and others (n 32) 311; Jeffrey L Dunoff, Steven R Ratner, and David Wippman, *International Law: Norms, Actors, Process* (Aspen Law & Business 2002) 110.

Dependence upon foreign aid does not necessarily influence the attitude of the international community on the issue of statehood, either.⁵⁸

2. Other Criteria of Statehood

While the criteria discussed above have been generally accepted, it is not without doubt that they are wholly sufficient for determining statehood or whether additional criteria are necessary.⁵⁹ Dugard has commented that while Rhodesia, Transkei, Bophuthatswana, Venda, Ciskei, and the TRNC appeared to have fulfilled these criteria, it is "absurd" to conclude that they acquired statehood.⁶⁰ Nonetheless, when considering whether the additional criteria are necessary, it would be "unwise to stress some 'Western' notions of Statehood (for instance, democracy) as if they were accepted universally".⁶¹ Additional requirements often referred to by commentators are introduced and analysed below.

a. Independence

While some regard the requirement of independence as encompassed within the criterion of "capacity to enter into relations with other States",⁶² others view it as a separate criterion.⁶³ However, this criterion may be problematic for two reasons. First, the growth in authority and competence of international organisations could carry consequences for statehood. In other words, as the conduct of a State is often guided by the policies of international organisations of which it is a member, and

⁵⁸ Shaw (n 1) 203.

⁵⁹ Crawford, *The Creation of States* (n 17) 89-95.

⁶⁰ These entities received virtually no recognition, and "an entity incapable of persuading more than one sponsor State to accept it as a State" arguably should not have any entitlement to statehood. John Dugard, *Recognition and the United Nations* (Grotius Publication Ltd 1987) 123.

⁶¹ Dixon, McCorquodale, and Williams (n 25) 137. See also Sean D. Murphy, 'Democratic Legitimacy and the Recognition of States and Governments' (1999) 48 ICLQ 545.

⁶² Harris (n 25) 98; Brownlie, *Principles* (n 43) 71; Crawford, *Brownlie's Principles* (n 43) 129.

⁶³ Crawford, *The Creation of States* (n 17) 62; Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (OUP 1963) 25-42.

perhaps even confined by the binding obligations that the State bears under the rules of those organisations, it may be argued that States can no longer make decisions independent from the influence of international organisations. If independence is to be considered as a criterion of statehood, the growth of international organisations may render the fulfilment of this criterion improbable. Second, it might be argued that this criterion entails independence in the legal dimension (legal autonomy from other States), and not other dimensions such as political or military independence. Yet, all dimensions are in fact interrelated. A State has to evaluate a wide range of factors in its decision-making processes, making it difficult to differentiate various aspects of independence for the purpose of this criterion.⁶⁴ It has even been suggested that considering the increasing interdependence among States, “absolute independence is impossible”.⁶⁵

In the context of statehood, independence could be “a synonym for sovereignty”,⁶⁶ and two notions derive from this criterion: *de jure* (formal) independence and *de facto* (actual) independence. The former requires that the governmental powers are vested in distinct authorities of the putative State, separate from other States, and the entity must regard itself as a State.⁶⁷ The latter entails that the government must exercise a certain degree of control over its territory, and its actions and decisions cannot be that of a third State.⁶⁸ The ROC (Taiwan) is sometimes referred to as an example of an entity with *de facto* independence, but not *de jure*

⁶⁴ Grant, ‘Defining Statehood’ (n 20) 438.

⁶⁵ Rosalyn Cohen, ‘The Concept of Statehood in United Nations Practice’ (1961) 109 U Pennsylvania L Rev 1127, 1140.

⁶⁶ Raič (n 30) 75. See also *Island of Palmas Case (US v Netherlands)* (1928) 2 RIAA 829, 838.

⁶⁷ Crawford, *The Creation of States* (n 17) 67; Raič (n 30) 76.

⁶⁸ Crawford, *The Creation of States* (n 17) 72; Raič (n 30) 78.

independence because it has refrained from making a claim of separate statehood from the PRC.⁶⁹

b. Permanence or Stability

In order for an entity to effectively fulfil its international legal obligations, a condition of permanence or stability appears crucial.⁷⁰ Scholars have provided the following factors to be used when evaluating the stability of a putative State: "(1) peaceful and orderly transfer of power from the mother country; (2) absence of external threats; (3) freedom from external control; (4) internal stability; (5) popular support evidenced by a free vote; (6) adoption of a constitution".⁷¹ Although in general this condition might not be considered as a criterion of statehood but merely a reflection of the Montevideo criteria, it remains especially relevant in cases where certain traditional criteria of statehood are not entirely fulfilled or when the rights of another State are involved.⁷² In other words, the permanent and stable existence of a regime may serve as evidence that it possess the features required by the traditional criteria of statehood. However, the determination of statehood relies on the fulfilment of the traditional criteria, and permanence or stability does not appear to be a criterion of statehood in and of itself.

c. Willingness and Ability to Observe International Law

Willingness to observe international law has sometimes been categorised as a criterion for statehood.⁷³ Yet it has often been argued that this is not

⁶⁹ Raič (n 30) 76. See also Grant, 'Defining Statehood' (n 20) 439. This issue is discussed in further detail in Chapter 5, Section II.B.

⁷⁰ Menon (n 5) 43.

⁷¹ *ibid* (citing H M Blix, 'Contemporary Aspects of Recognition' (1970) 130 *Recueil des Cours* 587, 635-36).

⁷² Crawford, *The Creation of States* (n 17) 90-91.

⁷³ *ibid* 91-92 (ultimately concluding that this criterion is "unnecessary and confusing").

a consideration of statehood. Failure to fulfil this criterion may lead to sanctions allowed by international law or other States' refusal to grant recognition, instead of denial of statehood.⁷⁴ Brownlie pointed out that such a requirement cannot logically be considered as a criterion of statehood since an entity can only bear obligations under international law if it is a State.⁷⁵ This view is questionable for two reasons. Firstly, statehood is no longer the *only* condition that incurs international obligations. Other entities in the international community may also be subject to international law, albeit not bearing the same extent of obligations as States. Thus, it is plausible to assess whether an entity has the willingness and ability to observe international law. Secondly, evaluating whether an entity fulfils this criterion is not the same as acknowledging that it has the legal capacity to carry out the same obligations as States. The criterion of willingness and ability to observe international law is not an issue of legal capacity, but a factual assessment of whether an entity intends to act, and is capable of acting, in conformity with international law.

Yet, this is not to suggest that this thesis considers the willingness and ability to observe international law to be a criterion of statehood. Instead, relevant practice and scholarly opinion rarely agree that it is such a criterion,⁷⁶ and it can be inferred that it may arguably be a consideration of recognition. For instance, in 1877 the US Secretary of State indicated that if a government was unable or unwilling to observe international law, it would not be "entitled to be regarded or recognized as a sovereign and

⁷⁴ *ibid* 91.

⁷⁵ Brownlie, *Principles* (n 43) 75. See also Crawford, *Brownlie's Principles* (n 43) 134.

⁷⁶ Crawford, *The Creation of States* (n 17) 91; Ti-Chiang Chen, *The International Law of Recognition: With Special Reference to Practice in Great Britain and the United States* (L C Green ed, Frederick A Praeger Inc 1951) 61.

independent power”.⁷⁷ Another example can be observed in the guidelines on the recognition of new States adopted by the European Community in 1991, in light of the dissolution of States in Eastern Europe and the Soviet Union. The guidelines required, among others, “respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights”.⁷⁸ The Guidelines go well beyond the traditional criteria of statehood⁷⁹ and have been regarded as political considerations, rather than “additional requirements of statehood”.⁸⁰

As far as statehood is concerned, it has been argued that even if a State falls into a state of anarchy where there is an absence of responsibility for public order, and therefore is no longer able to uphold the rules of international law, it would not cease to be a State.⁸¹ This argument might have limited effect because it only covers one scenario where the lack of willingness and ability to observe international law (that is, the chaos or the absence of governmental structure). Also, it appears to relate to the issue of extinction of statehood rather than the criteria with which to judge the status of a putative State. Still, the fact remains that, although willingness and ability to observe international law has been considered in the context of statehood and recognition, little support can be found to suggest that it is an accepted additional criterion of statehood.

d. Legality of Establishment

⁷⁷ Crawford, *The Creation of States* (n 17) 91 (citing John Bassett Moore, *A Digest of International Law*, vol 2 (Government Printing Office 1906) 6).

⁷⁸ European Community, ‘Declaration on the “Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union”’ (16 December 1991) 31 ILM 1486.

⁷⁹ Damrosch and others (n 32) 312.

⁸⁰ Harris (n 25) 133.

⁸¹ Crawford, *The Creation of States* (n 17) 91.

The circumstances surrounding the establishment of the putative State are often taken into consideration when determining issues of statehood.⁸² For instance, the consequence of a unilateral declaration of independence might be regarded as contrary to the respect of territorial integrity of a State and therefore illegal, and the claim of statehood of the putative State might be called into question.⁸³ In 1992, the Badinter Arbitration Commission was asked to consider the question of whether “the Federal Republic of Yugoslavia is a new State calling for recognition by the Member States of the European Community”.⁸⁴ The Commission noted in its Opinion 10 that, while recognition is a discretionary act of an existing State, it remains subject to rules of international law, “particularly those prohibiting the use of force in dealings with other States or guaranteeing the rights of ethnic, religious or linguistics minorities”.⁸⁵

It is generally agreed that a situation created by violation of the prohibition of the use of force or other established rules of international law should not be recognised as lawful. This can be observed in, for instance, the UN Security Council and General Assembly Resolutions regarding the situations in Rhodesia⁸⁶ and the Bantustans in South Africa,⁸⁷ the UN International Law Commission (ILC) Articles on Responsibility of States for Internationally Wrongful Acts,⁸⁸ and scholarly writings.⁸⁹ However, most of

⁸² Shearer (n 39) 87.

⁸³ *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645, 722-28 (PC). See also Jericho Nkala, *The United Nations, International Law, and the Rhodesian Independence Crisis* (OUP 1985) 43-52; Restatement (Third) of Foreign Relations Law (n 23) § 202(2) (“A state has an obligation not to recognize or treat as a state an entity that has attained the qualifications for statehood as a result of a threat or use of armed force in violation of the United Nations Charter”).

⁸⁴ Badinter Arbitration Commission, Opinion 10 (1992) 92 ILR 206.

⁸⁵ *ibid.*

⁸⁶ UNSC Res 216 (12 November 1965) UN Doc S/RES/216 (“call[ing] upon all States not to recognize this illegal racist minority régime in Southern Rhodesia”).

⁸⁷ UNGA Res 31/6A (26 October 1976) UN Doc A/RES/31/6A (“call[ing] upon all Governments to deny any form of recognition to the so-called independent Transkei”).

⁸⁸ ILC, ‘Articles on Responsibility of States for Internationally Wrongful Acts’, UNGA Res 56/83 (12 December 2011) UN Doc A/RES/56/83, Annex, art 41(2) (ILC Articles on State Responsibility).

⁸⁹ Eg Merrie Faye Witkin, ‘Transkei: An Analysis of the Practice of Recognition – Political or

the relevant discussions are phrased in the language of recognition, rather than as criteria of statehood. In addition, the ICJ in the *Namibia Advisory Opinion* emphasised the duty of non-recognition and stated UN Member States were

under [an] obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to refrain from any acts and in particular any dealings with the Government of South Africa *implying recognition* of the legality of ... such presence and administration.⁹⁰

Another example can be found in the United Kingdom's statement in relation to the TRNC: "the occupation of the northern section of Cyprus is illegal and we do not recognise the so-called Turkish Republic of Northern Cyprus as a legitimate entity".⁹¹ Additionally, the entities involved in these situations often fail to fulfil other potential criteria of statehood, especially the notion of independence, since such violation of the prohibition of the use is usually controlled or supported by third States. In short, although it remains true that a putative State established through unlawful means is generally not considered as a State, this may result from the fact that other States have the duty to not recognise such a State or from the fact that the putative State is in fact a puppet entity controlled by a third State and therefore lacks *de facto* independence. It does not necessarily follow that the legality of the establishment of the entity is a criterion of statehood.

Legal?' (1977) 18 Harvard Intl LJ 605, 615.

⁹⁰ *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (Advisory Opinion) [1971] ICJ Rep 16, 58 (emphasis added).

⁹¹ Press Statement of Secretary of State, Foreign and Commonwealth Office (16 December 1997) reprinted in (1997) 68 British YB Intl L 520.

e. Self-Determination

While the compliance with self-determination may impact the previous consideration, the legality of a putative State's establishment, it may also be relevant for evaluating other aspects of statehood. Over the past century, the principle of self-determination has transformed from a political concept, as recognised in the *Åland Island Case*, to a legal right stipulated in the Charter of the United Nations,⁹² the two 1966 UN human rights covenants,⁹³ and affirmed in the jurisprudence of the ICJ.⁹⁴ The right is generally described as having two dimensions: external and internal.⁹⁵ The former concerns the right of a people to determine its international legal status and the status of the territory it lives on. The latter refers to the right of a people to self-government and to freely pursue its political and economic development.⁹⁶ The development of the right has greatly affected the traditional criterion of government, and this criterion is no longer limited to issues of effectiveness and stability.⁹⁷ Rather, the representativeness of the government has been suggested as an aspect of "government" that needs to be taken into consideration when evaluating it for the purpose of statehood. Some have even suggested that it could be an additional criterion of statehood.⁹⁸ Observance of the right to self-determination could reinforce the effectiveness of control over certain

⁹² Charter of the United Nations (n 8) art 1(2).

⁹³ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, art 1; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 1.

⁹⁴ *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (n 90) 31; *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12, 31-33.

⁹⁵ Robert McCorquodale, 'Self-Determination: A Human Rights Approach' (1994) 43 ICLQ 857, 863-64.

⁹⁶ See Michla Pomerance, *Self-Determination in Law and Practice: The New Doctrine in the United Nations* (Martinus Nijhoff Publishers 1982) 37-42; Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (CUP 1995) 67-140; *Reference re Secession of Quebec* [1998] 2 SCR 217.

⁹⁷ Shaw (n 1) 205.

⁹⁸ Raič (n 30) 437. See Thomas D Grant, *The Recognition of States: Law and Practice in Debate and Evolution* (Praeger 1999) 84-94 (discussing whether self-determination is a new criterion for statehood or a criterion for recognition).

territory, while the absence of it could potentially prevent an entity from becoming a State.⁹⁹

f. Recognition

Whether a newly-born State has acquired statehood pursuant to the criteria outlined above is a question of fact.¹⁰⁰ The majority of the literature seems to object to adopting recognition as a criterion of statehood.¹⁰¹ Among the reasons behind this objection is the principle of sovereign equality, which effectively prevents one or more States from denying the existence of a newly-born State by refusing to recognise it.¹⁰² While according to this school of thought, the act of recognition in theory carries no legal consequences for the determination of the statehood of the entity,¹⁰³ the attitude of existing States might be of help in ascertaining whether an entity fulfils the requisite criteria, and some even argue that an entity's participation in the international community is conditioned upon the recognition of other States.¹⁰⁴ It appears difficult to separate the act and effect of recognition from the issue of statehood and the ability of the putative State to engage in international affairs.¹⁰⁵ Thus the section below will further analyse the theories and practice of recognition.

B. Recognition: Theories and Effect

1. Recognition in General

⁹⁹ Cassese, *Self-Determination of Peoples* (n 96) 101.

¹⁰⁰ J L Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (Humphrey Waldock ed, 6th edn, OUP 1963) 137.

¹⁰¹ Eg Crawford, *The Creation of States* (n 17) 93; Shaw (n 1) 447; Milena Sterio, 'A Grotian Moment: Changes in the Legal Theory of Statehood' (2011) 39 *Denver J Intl L & Pol'y* 209, 215-16. Such a view is also supported by Article 3(1) of the Montevideo Convention: "The political existence of the state is independent of recognition by the other states."

¹⁰² Guido Acquaviva, 'Subjects of International Law: A Power-Based Analysis' (2005) 38 *Vanderbilt J Transnatl L* 345, 350.

¹⁰³ Cassese, *International Law* (n 12) 73.

¹⁰⁴ Portmann (n 3) 43.

¹⁰⁵ Jennings and Watts (eds) (n 31) 129. See also Craven, 'Statehood, Self-Determination, and Recognition' (n 52) 239 (arguing that "it is frequently impossible to entirely dissociate the fact of recognition from the idea of political approval").

At the outset, it is important to point out that there are two categories of recognition: recognition of States and of governments. Recognition of a community as a State indicates that it fulfils the criteria of statehood¹⁰⁶ and that the recognising State declares that it regards the community as a State that has "the rights and duties which flow from statehood".¹⁰⁷ Recognition of governments, on the other hand, does not entail the creation of new subjects of international law.¹⁰⁸ Instead, it implies that the recognising State acknowledges the new government lawfully represents its State,¹⁰⁹ especially in situations where the new government is not formed in accordance with the constitution of the State in question.¹¹⁰ Such recognition also indicates a willingness to enter into official relations with the new government.¹¹¹ As the focus of this research lies on entities not recognised as States, the following discussion will focus on the first category of recognition.

A distinction should also be made between the act of recognition and the establishment of diplomatic relations. While the existence of diplomatic relations between two States implies mutual recognition of both parties, the two concepts should not be considered as identical, and the severance of diplomatic relations should not be deemed as withdrawal of State recognition.¹¹² Furthermore, while on most occasions recognition is made through formal diplomatic statements or the establishment of diplomatic relations, practice seems to suggest the possibility of implied recognition.¹¹³ However, the implication can only be made in exceptional

¹⁰⁶ H Lauterpacht, 'Recognition of States in International Law' (1944) 53 Yale LJ 385, 385.

¹⁰⁷ Mugerwa (n 10) 267.

¹⁰⁸ See Jennings and Watts (eds) (n 31) 148.

¹⁰⁹ M J Peterson, *Recognition of Governments: Legal Doctrine and State Practice* (Macmillan Press Ltd 1997) 1-2.

¹¹⁰ Damrosch and others (n 32) 348; Shaw (n 1) 454.

¹¹¹ Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* (OUP 1998) 23.

¹¹² Mugerwa (n 10) 267.

¹¹³ See H Lauterpacht, *Recognition in International Law* (CUP 1948) 369-408.

circumstances, such as a State's issuance of a consular *exequatur* (admitting in its territory a consul of a previously unrecognised State).¹¹⁴ Recognition, explicit or implied, is often an act motivated by political considerations, and the delay, refusal, or grant of recognition has often been for reasons not of a legal nature.¹¹⁵

2. Theories of Recognition

As noted previously, the issue of recognition is closely related to the determination of statehood. In terms of the nature of recognition, two theories have traditionally been the focus of the literature: the constitutive theory and the declaratory theory.¹¹⁶ The constitutive theory contends that the personality of a putative State is ascertained, not through the examination of the criteria of statehood outlined above, but through the recognition of existing States.¹¹⁷ In other words, this theory "deduces the legal existence of new States from the will of those already established".¹¹⁸ The latter, the declaratory theory, in contrast, argues that the act of recognition is independent from the consideration of statehood.¹¹⁹ That is, a new State is created when the factual conditions are in conformity with the requirements of statehood, and the recognition of other States serves merely as acknowledgement of the fact.

The majority of literature and State practice seems to support the declaratory, rather than the constitutive, view.¹²⁰ It has even been

¹¹⁴ Shearer (n 39) 123.

¹¹⁵ Philip Marshall Brown, 'The Legal Effect of Recognition' (1950) 44 AJIL 617, 620.

¹¹⁶ Lauterpacht, *Recognition* (n 113) 38; Dugard (n 60) 7. See also Chen, *Recognition* (n 76) 30-78.

¹¹⁷ Shaw (n 1) 45-46

¹¹⁸ Lauterpacht, *Recognition* (n 113) 38.

¹¹⁹ *ibid* 43-51.

¹²⁰ Stefan Talmon, 'The Constitutive Versus the Declaratory Theory of Recognition: *Tertium Non Datur*' (2004) 75 British YB Intl L 101, 105. Eg Brierly (n 100) 139; Ian Brownlie, 'Recognition in Theory and Practice' (1982) 53 British YB Intl L 197, 205-06; Lowe (n 2) 161; Shaw (n 1) 447; Stefan Oeter, 'The Role of Recognition and Non-Recognition with Regard to Secession' in Christian Walter, Antje von Ungern-Sternberg, and Kavus Abushov (eds), *Self-*

suggested that assuming recognition has a constitutive function deprives the right to self-determination of its legal substance; since the exercise of such a right is based on objective criteria, it should not be prevented due to other States' attitudes.¹²¹ Still some argue that the practice concerning recognition in fact is usually ambiguous,¹²² and that while the declaratory theory might be the logical choice, the fourth criterion of statehood - capacity to enter into relations with other States - necessitates the willingness of other States to engage in relations with the new State, and thus recognition is essentially constitutive.¹²³ The debate between the two theories adds to the complexity of the issue of recognition, and the case of Taiwan is often cited when testing the relationship between statehood and recognition.¹²⁴ The status of Taiwan will be analysed in detail in Chapter 5.

3. Legal Effect of Recognition

The act of recognition is followed by effects under both municipal law and international law.¹²⁵ At the national level of the recognising State, the grant of State recognition might lead to the conferment of privileges and immunities, the capacity to bring claims in its courts, and the acceptance of the validity of the new State's legislative acts.¹²⁶ At the international level, recognition of a new State represents "a legal acknowledgement of a factual state of affairs" and that it enjoys rights and bears duties under international law.¹²⁷

According to the prevalent declaratory theory of recognition, the factual existence of a State is not determined by the recognition of other States.

Determination and Secession in International Law (OUP 2014) 48.

¹²¹ Schoiswohl (n 18) 35-36.

¹²² O'Connell, *International Law* (n 54) 130-31.

¹²³ Gardiner (n 27) 190.

¹²⁴ Eg Craven, 'Statehood, Self-Determination, and Recognition' (n 52) 241.

¹²⁵ Shaw (n 1) 444.

¹²⁶ Dixon, McCorquodale, and Williams (n 25) 164; Shearer (n 39) 134-35.

¹²⁷ Shaw (n 1) 471.

It has thus been asserted that even if a putative State is not recognised as a State, “its territory cannot be considered to be no-man’s-land; there is no right to overfly without permission; ships flying its flag cannot be considered stateless”;¹²⁸ and that “non-recognition is not identical to denying any status under international law”.¹²⁹ Unrecognised entities do not exist in legal vacuum,¹³⁰ and some even suggest that unrecognised entities should nevertheless abide by universally recognised rules of international law.¹³¹ The following Section attempts to conceptualise the notion of “unrecognised entities” for the purpose of this thesis to facilitate the examination of the application of international human rights law in subsequent chapters.

III. Defining “Unrecognised Entities”

A. Conceptualising “Unrecognised Entities”

Although different reasons contribute to the lack of general recognition of entities that display State-like characteristics, certain common features can be observed. On the one hand, due to the lack of international recognition, these entities’ interactions with other States and international organisations are limited, and its capacity to enjoy rights and bear obligations under international law questioned. On the other hand, however, these entities carry out State-like functions, and they and their territories are generally beyond the control of the States who possess *de jure* sovereignty over those territories (the “parent State”). The relationship between the ROC (Taiwan) and the PRC is one such example,

¹²⁸ Mugerwa (n 10) 269.

¹²⁹ Jochen Abr Frowein, ‘De Facto Régime’ in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law*, instalment 10 (North-Holland 1987) 73.

¹³⁰ For instance, principles of international law seem to oblige unrecognised entities exercising *de facto* control over a certain territory to refrain from violating the rights to property and personal integrity of nationals of third States. Schoiswohl (n 18) 265.

¹³¹ Shaw (n 1) 471.

with the latter being the “parent State”. While the lack of international recognition is clearly one essential aspect of the notion of “unrecognised entities”, the question of which State-like characteristics and functions are relevant in conceptualising the notion and eventually providing a detailed definition merits further consideration. In this connection, it is important to take into account the aim of the thesis.

This thesis does not set out to analyse the legal status of unrecognised entities under international law in general. Instead, it aims to explore the application of international human rights law to these entities.¹³² An integral part of conceptualising the notion of “unrecognised entities” is the consideration of the nature of international human rights law since it highlights the need to study the research questions presented in this thesis. In theory, the parent State bears obligations under international human rights law in relation to the territory of unrecognised entity. However, such an imposition of international human rights obligations does not translate into implementation in reality since the territory in question and the governing entity are factually beyond the control of and independent from the parent State. This situation appears to have created a gap between the theoretical and factual implementation of international human rights law in those territories. Therefore, this thesis seeks to ascertain whether such a gap exists, and if it does, whether it should and can be remedied by imposing obligations on unrecognised entities.

To approach these questions, the relationship between rights-holders and an entity is an important ground in determining the definition of an unrecognised entity. Modern international law has seen the emergence of

¹³² Excluding certain entities from the scope of the present research does not imply that this thesis takes the position that those entities are not governed by the rules of international law in general, or international human rights law specifically.

various categories of non-State actors,¹³³ and among the wide array of actors, many are likely to undertake actions that influence the enjoyment of human rights by individuals. It has been argued that such actors might acquire rights and duties under international law through “capacity”, instead of “subjectivity” and “personality”.¹³⁴ While only States possess all types of capacity to act at the international level, different categories of non-State actors have different capacities to act and are thus subject to different rules of international law that impose rights and obligations on those actors. In some cases, international law has explicitly prescribed the imposition of international legal obligations. Such is the instance of the rules governing armed conflicts, which directly regulate the conduct of parties to the conflict.¹³⁵ In other cases, such as the applicability of international human rights law to unrecognised entities, the rules are not yet clarified. The similarities between the characteristics of unrecognised entities and those of States and between their relationships vis-à-vis the population living in their territories would suggest that unrecognised entities should be subject to international human rights law or similar rules. Traditionally, human rights have been perceived as fundamental guarantees against abuse of sovereign power by States¹³⁶ and a set of rules “regulat[ing] the relationship between the government and governed”.¹³⁷ It has also been argued that human rights norms can be applied to “an entity exercising powers analogous to those of governments” in its relations with those subject to its powers.¹³⁸ Some

¹³³ Menon (n 5). See also Alston, ‘The “Not-a-Cat” Syndrome’ (n 5).

¹³⁴ Clapham, *Human Rights Obligations* (n 14) 70-73.

¹³⁵ H. Lauterpacht, ‘General Rules of the Law of Peace’ in E. Lauterpacht (ed), *International Law: Collected Papers of Hersch Lauterpacht*, vol 1 (CUP 1970) 284.

¹³⁶ August Reinisch, ‘The Changing International Legal Framework for Dealing with Non-State Actors’ in Alston (ed) (n 5) 37-38.

¹³⁷ Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law* (CUP 2002) 40.

¹³⁸ Nigel S Rodley, ‘Can Armed Opposition Groups Violate Human Rights?’ in Kathleen E. Mahoney and Paul Mahoney (eds), *Human Rights in the Twenty-First Century: A Global Challenges* (Kluwer Academic Publishers 1993) 300.

human rights instruments even expressly expand the scope of duty bearers to “entities exercising effective power”.¹³⁹ Nevertheless, in the absence of an explicit prescription, it remains difficult to ascertain whether unrecognised entities are bound by international human rights obligations.¹⁴⁰

The above describes the underlying considerations for conceptualising the notion of “unrecognised entities”. The traditional and additional criteria of statehood provide a starting point for this exercise since unrecognised entities are State-like, but not all criteria of statehood are required for an entity to be considered as an unrecognised entity. In this thesis, “unrecognised entities” are entities that fulfil the traditional criteria of statehood, or the “Montevideo criteria”, and achieve *de facto* independence but are not generally recognised as States by the international community. Essentially, besides the criterion concerning (the lack of) recognition, only the criteria pertaining to the structure, functions, and factual control of an entity are considered relevant since those criteria help locate entities whose relationships with the population within their control mirror that between a State and its population. Other criteria accordingly do not form a part of the definition of unrecognised entities, so the present research does not take into account most of the additional criteria of statehood discussed in Section II.A.2 (except for the notions of *de facto* independence and recognition, which are elaborated respectively in Sections III.B.2 and III.B.3 below). The reasons behind the exclusion of those criteria will be discussed in Section III.C.

B. Criteria of “Unrecognised Entities”

¹³⁹ UNGA Res 3452 (XXX) (9 December 1975) UN Doc A/RES/3452(XXX), preamble.

¹⁴⁰ Clapham, *Human Rights Obligations* (n 14) 71.

Based on the definition provided above, the criteria of “unrecognised entities” can be broken down into three aspects: a) the Montevideo criteria of statehood; b) *de facto* independence; and c) the lack of general State recognition. Each of the criteria of “unrecognised entities” are further elaborated below.

1. Traditional Criteria of Statehood

Firstly, the entity in question must objectively possess the qualifications/criteria of a State as defined in Article 1 of the 1933 Montevideo Convention: a) permanent population; (b) defined territory; (c) government; and (d) capacity to enter into relations with other States.¹⁴¹ It follows that international organisations, many of which have strong influence over the policies of their members and perform functions that greatly affect the lives of individuals, are not considered as “unrecognised entities” in this research.

As noted earlier, “unrecognised entities” are those entities whose relations with the people subject to their governance are similar to the relations between a State and those within its jurisdiction, and they display State-like characteristics. Thus, in applying the criteria of statehood to determine if a given entity should be considered as an “unrecognised entity”, this thesis adopts the same interpretation of those criteria as in the context of statehood.

Regarding the first qualification, permanent population, as explained earlier, there is no minimum number that the population must reach. While in theory, the status of an entity as a State might be disputed if the

¹⁴¹ Convention on the Rights and Duties of States (n 21) art 1.

number of people is very small,¹⁴² so far there is no practice suggesting that the putative statehood of an entity has been challenged for such a reason. Further, observing the practice in the UN, Franck and Hoffman have concluded that “infinitesimal smallness has never been seen as a reason to deny self-determination to a population”,¹⁴³ and the exercise of the right to self-determination might lead to political independence and the establishment of a new State.

The second qualification, “defined territory”, distinguishes “unrecognised entities” from rebel groups that undertake sporadic violence and do not exercise control over a certain territorial area in a State. However, certain armed groups that engage in conflicts governed by Additional Protocol II of the 1949 Geneva Conventions might be considered as “unrecognised entities”,¹⁴⁴ provided that they fulfil the other criteria introduced below, since Article 1(1) of the Additional Protocol requires that the dissident armed groups exercise control over a part of the territory of a High Contracting Party. The requirement of a “defined territory” does not demand that the territorial borders of an entity be absolutely undisputed, and this interpretation is commonly agreed by scholars¹⁴⁵ and demonstrated in state practice¹⁴⁶ and jurisprudence.¹⁴⁷ For instance, within the territory over which the Republic of Abkhazia claims to exercise sovereignty, Georgia in fact retains control over the upper Kodori Gorge,

¹⁴² Menon (n 5) 37.

¹⁴³ Thomas M Franck and Paul Hoffman, ‘The Right of Self-Determination in Very Small Places’ (1976) 8 NYU J Intl L & Pol 331.

¹⁴⁴ See Scott Pegg, *International Society and the De Facto State* (Ashgate 1998) 30-32.

¹⁴⁵ Eg Brownlie, *Principles* (n 43) 71; Crawford, *Brownlie’s Principles* (n 43) 128; Shaw (n 1) 199; Aust, *Handbook* (n 4) 17.

¹⁴⁶ See n 41.

¹⁴⁷ See n 42.

which is geographically located in the region of Abkhazia;¹⁴⁸ however, this fact alone would not exclude Abkhazia from the scope of this research.

With regard to the third qualification, the “government” must exercise effective control over the territory in question. In other words, it must “exercis[e] all the functions of a sovereign government in maintaining law and order, instituting and maintaining courts of justice, adopting or imposing laws regulating the relations of the inhabitants of the territory to one another and to the government”.¹⁴⁹ For instance, since the late 1990s, the Liberation Tigers of Tamil Eelam (LTTE) began to gradually control some areas of Sri Lanka. Although the LTTE was eventually defeated in 2009, for a period of time it had exercised effective control over the North and East of Sri Lanka. It developed extensive governmental apparatus to conduct border control (with the border between the LTTE-controlled areas and those controlled by the Sri Lankan government resembling the border between two States) and revenue collection, and provided police and public services, as well as a judiciary.¹⁵⁰ These are examples of functions usually performed by a sovereign government, and the LTTE should be considered as fulfilling this qualification.

Lastly, concerning the fourth qualification, the capacity to enter into relations with other States, it is conceivable that unrecognised entities would encounter certain difficulties in establishing relations with other States. Yet, it should be highlighted that this qualification calls for the “capacity” to enter into such relations, rather than the actual establishment of such relations. As discussed earlier in the context of statehood, an

¹⁴⁸ ‘Report of the Independent International Fact-Finding Mission on the Conflict in Georgia’ Vol II, 130 <http://www.ceiig.ch/pdf/IIFFMCG_Volume_II.pdf> accessed 20 August 2014. Geldenhuys (n 34) 75.

¹⁴⁹ *Government of Republic of Spain v SS Arantzazu Mendi and others* [1939] AC 256 (HL) 264-65.

¹⁵⁰ Kristian Stokke, ‘Building the Tamile Eelam State: Emerging State Institutions and Forms of Governance in LTTE-Controlled Areas in Sri Lanka’ (2006) 27 Third World Q 1021, 1022.

important aspect of this capacity is the entity's ability to act independently from other States. How such independence must be manifested in the context of unrecognised entities will be explored below.

2. *De Facto* Independence

Secondly, the entity in question must achieve *de facto* independence, and it entails that the government must exercise a certain degree of control over its territory, and its actions and decisions cannot be that of another State.¹⁵¹ In other words, the putative State cannot be subject to "foreign control overbearing the decision-making of the entity concerned on a wide range of matters of high policy and doing so systematically and on a permanent basis".¹⁵² In the context of statehood, in addition to *de facto* independence, the putative State must also have formal independence, which requires that the entity must regard itself as a State.¹⁵³ However, as this research focuses on entities that objectively function as governments and exercise effective control over the territory, whether the entity in question claims to be an independent State or considers itself as a State does not influence the relationship between it and the people under its governance.

The entity in question must not be a "puppet State",¹⁵⁴ which is described by Crawford as "nominal sovereigns under effective foreign control, especially in cases where the establishment of the puppet State is intended as a cloak for illegality".¹⁵⁵ Manchukuo, established by Japan in 1932 in the Chinese province of Manchuria, has often been cited as an example of

¹⁵¹ Crawford, *The Creation of States* (n 17) 72; Raič (n 30) 78.

¹⁵² Brownlie, *Principles* (n 43) 72. See also Crawford, *Brownlie's Principles* (n 43) 130.

¹⁵³ Crawford, *The Creation of States* (n 17) 67; Raič (n 30) 76.

¹⁵⁴ The usage of the term "puppet State", which is commonly adopted in the literature, does not imply that such entities have acquired statehood or should be recognised as States.

¹⁵⁵ Crawford, *The Creation of States* (n 17) 78.

a puppet State.¹⁵⁶ Since such entities are often created for the very purpose of circumventing applicable rules of international law,¹⁵⁷ imposing international legal obligations on the puppet States and thus holding it internationally responsible for acts controlled by another State cannot be justified. As the purpose of this thesis is to explore whether and to what extent unrecognised entities bear international human rights obligations, an entity without *de facto* control within the territory it claims to occupy is excluded from the scope of the present research, since it is the State controlling the puppet State that should be held internationally responsible for the actions taken in the name of latter.¹⁵⁸

The fact that an entity receives foreign support does not necessarily lead to the conclusion that it is not independent, unless the control by the State providing support is so substantial that it deprives the entity in question of space and discretion in decision-making processes. In relation to the notion of control, different standards have been adopted in international jurisprudence, most notably the “effective control” test adopted by the *Nicaragua Case* before the ICJ and the “overall control” test adopted by the *Tadić Case* before the International Criminal Tribunal for the former Yugoslavia (ICTY). Admittedly, these two tests are not devised for the purpose of determining statehood or independence. However, both tests deal with the influence of a State over a non-State entity (such as an armed group) and aim to assess the degree of autonomy of the non-State entity in question. In essence, the tests are used to determine what level of control is sufficient to render a non-State entity a *de facto* organ of the

¹⁵⁶ *ibid*; Raič (n 30) 81; Krystyna Marek, *Identity and Continuity of States in Public International Law* (Librairie Droz 1968) 173. See Lauterpacht, *Recognition* (n 113) 46-47.

¹⁵⁷ Marek (n 156) 169.

¹⁵⁸ Raič (n 30) 78.

controlling State, which is closely related to the criterion of *de facto* independence discussed here.

In the *Nicaragua Case*, the ICJ adopted the “effective control” test to determine whether the conduct of the *contra* guerrillas was attributable to the US. The Court held that for the unlawful conduct to “give rise to legal responsibility of the US, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed”.¹⁵⁹ Based on this test, the “financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation” by the US was insufficient to attribute the acts of the *contra* to it, and evidence of specific direction and enforcement of perpetration is needed to establish “effective control”.¹⁶⁰ A different standard of control was proposed by the ICTY’s Appeals Chamber in the *Tadić Case*, where it was held that “overall control” by a State over “subordinate armed forces or militias or paramilitary units” must entail “more than the mere provision of financial assistance or military equipment or training”, but it is not necessary that “the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations”.¹⁶¹ This test was employed to determine whether the control of a foreign State is sufficient to categorise an otherwise non-international conflict as an international one.¹⁶²

¹⁵⁹ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)* [1986] ICJ Rep 14, 65.

¹⁶⁰ *ibid* 64.

¹⁶¹ *Tadić Case* (Judgment) ICTY-94-1 (26 January 2000) para 137.

¹⁶² *ibid* para 162.

For the purpose of this thesis, the “effective control” test will be adopted to determine whether an entity has achieved *de facto* independence. In other words, if an entity is subject to “effective control” of another State, then it will not be considered as *de facto* independent. The notion of “effective control” has been adopted in the UN ILC Articles on Responsibility of States for Internationally Wrongful Acts. Article 8 stipulates that: “The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”¹⁶³ Thus, if the conduct of an entity subject to “effective control” of another State violates international law, the controlling State may potentially be held responsible for the violation in question. Turning to the focus of this thesis, the applicability of international human rights law, if another State can be held liable for the acts, including those amounting to human rights violations, of an entity, it would not be necessary to study the possibility for that entity to be a duty-bearer under international human rights law. Therefore, the “effective control” test is chosen to determine the level of foreign control over an entity and ascertain whether *de facto* independence has been achieved for the purpose of the definition of unrecognised entities.

For instance, when the LTTE controlled the North and East of Sri Lanka, it received support from India in the form of arms, money and training. However, such support was not provided on a permanent basis, and India was not able to influence other aspects of the LTTE’s administration of the region, and the LTTE did not act under the instruction of India.¹⁶⁴ Thus, India’s support did not amount to effective control and consequently the

¹⁶³ ILC, ‘Articles on Responsibility of States for Internationally Wrongful Acts’ (n 88) art 8.

¹⁶⁴ Pegg (n 144) 80-81.

LTTE-controlled Tamil Eelam is not excluded from the scope of this research. Another case in point is the influence exerted by Russia over two entities: South Ossetia and Abkhazia. Both entities receive financial support from Russia, and Russia has issued passports to a large number of individuals living in the regions. However, certain characteristics differentiate the two entities. Firstly, a greater extent of Russian control can be observed in South Ossetia than in Abkhazia. In South Ossetia, many of the senior positions in its institutions are in fact staffed by “Russian representatives or South Ossetians with Russian citizenship that have worked in previously equivalent positions in Central Russia or in North Ossetia”, and Russia has exerted systematic and permanent influence over a wide range of internal and external matters.¹⁶⁵ In addition, Russia has provided arms, equipment, and training to personnel of South Ossetia in the latter’s conflict with Georgia.¹⁶⁶ All the abovementioned arrangements seem to suggest that South Ossetia in fact remains under the control of Russia and has not obtained *de facto* independence. As for Abkhazia, the support it has received from Russia remains mainly financial, and Russia’s control does not appear sufficient to constitute effective control. Thus, Abkhazia remains *de facto* independent from Russia. The question of whether Russia has exercised effective control over South Ossetia and Abkhazia was put to the European Court of Human Rights (ECtHR) in *Georgia v Russia (II)*. Although the Court noted the issue of effective control in its decision declaring the admissibility of the case, it did not rule on it and deferred the consideration of relevant matters to the

¹⁶⁵ ‘Report of the Independent International Fact-Finding Mission on the Conflict in Georgia’ (n 148) 132-33; Geldenhuys (n 34) 82.

¹⁶⁶ ‘Report of the Independent International Fact-Finding Mission on the Conflict in Georgia’ (n 148) 131.

merit stage of the proceedings.¹⁶⁷ As of July 2014, the case is still pending before the ECtHR.

3. Lack of General Recognition

Lastly, from the perspective of the international community, the statehood of the entity in question must be disputed and not generally recognised. Adopting non-recognition as a criterion does not imply that this research considers recognition as a requirement of statehood, thus taking a constitutive approach¹⁶⁸ towards the character of recognition. Rather, this research acknowledges that, despite the debate between the constitutive and declaratory theories, in reality, entities without general international recognition often encounter difficulties when attempting to engage in international relations or to participate in the international legal regime. Such entities are usually denied membership in inter-governmental organisations and are barred from becoming parties to multilateral treaties. In most cases, considering that the “parent State” continues to claim sovereignty over the entirety of its respective territories and to assert “sole representation power”, participation in multilateral treaties is difficult for those entities.¹⁶⁹

Turning to the nature of this criterion, the fact that the entity in question is recognised by some States does not exclude it from the scope of the research. It has been proposed that if an entity possesses the majority of the following five features, it may be regarded as obtaining general recognition:¹⁷⁰ a) the entity is recognised by some of the major powers in the international community, such as permanent members of the UN

¹⁶⁷ *Georgia v Russia (II)* App no 38263/08 (Preliminary Objections) (ECtHR, 13 December 2011) paras 66-67.

¹⁶⁸ See Section II.B of the present chapter.

¹⁶⁹ B R Bot, *Nonrecognition and Treaty Relations* (A W Sijthoff 1968) 15.

¹⁷⁰ Pegg (n 144) 38.

Security Council; b) the entity is recognised by the “parent State” that it seeks to declare independence from; c) the entity is recognised by neighbouring countries; d) the entity is recognised by a majority of UN Member States; and e) the entity is allowed to participate in international and regional organisations. These elements are not cumulative, and therefore it is not necessary for an entity to fulfil all five conditions in order to be considered as having obtained general recognition. In this regard, the four contested entities that emerged after the dissolution of the Soviet Union: Abkhazia, South Ossetia, Transnistria, and Nagorno-Karabakh only receive mutual recognition and recognition from the Russian Federation. Although the Russian Federation is a permanent member of the UN Security Council, its special status as their patron State should be taken into consideration, and since the four entities are not recognised by other States, there is insufficient evidence of general recognition. The elements of general recognition mentioned above are further examined in the context of various entities below to illustrate their interpretation in this thesis.

The level of recognition received by “unrecognised entities”, as defined by this thesis, varies. On the one end of the spectrum is the Republic of Somaliland, which is said to have fulfilled the Montevideo criteria of statehood.¹⁷¹ Compared to the rest of Somalia, Somaliland is relatively stable, and violence and conflicts are rare.¹⁷² Still, Somaliland’s declaration of independence has been considered a secessionist claim,¹⁷³ and it remains devoid of international recognition. Although the

¹⁷¹ Alison K Eggers, ‘When is a State a State? The Case for Recognition of Somaliland’ (2007) 30 Boston College Intl & Comp L Rev 211, 217-19; Alexis Arieff, ‘De Facto Statehood? The Strange Case of Somaliland’ (2008) 3 Yale J Intl L 60, 62; Geldenhuys (n 34) 135.

¹⁷² Crawford, *The Creation of States* (n 17) 414.

¹⁷³ Shaw (n 1) 237; Crawford, *The Creation of States* (n 17) 403.

Somaliland government has been long campaigning for its recognition,¹⁷⁴ due to “an overwhelming lack of interest” of the international community,¹⁷⁵ substantive recognition remains unlikely to be achieved.¹⁷⁶ On the other end of the spectrum is the Republic of Kosovo, which has to date received recognition from over 90 States,¹⁷⁷ presenting a more ambiguous case. However, the present research still deems it to be an “unrecognised entity” since it has not been recognised by its “parent State”, Serbia, and approximately half of the States of the international community, and since its participation in international organisations remains limited. The ROC (Taiwan) presents a case in between. Although it maintains formal diplomatic relations with 22 States¹⁷⁸ and holds membership or observership in over 50 inter-governmental organisations,¹⁷⁹ it is still regarded as having not attained “substantive recognition”¹⁸⁰ as it holds at most the last feature identified above (in that it is allowed to participate in some inter-governmental organisations). Thus, it qualifies as an “unrecognised entity” for the purpose of the thesis.

On the other hand, some entities, despite their disputed statehood, are not categorised as unrecognised entities due to the recognition they have received from other States and/or international organisations. For instance, although the Holy See is not a Member of the UN, and its statehood is not without question,¹⁸¹ it nevertheless has established diplomatic relations

¹⁷⁴ See Ministry of Information, Republic of Somaliland, ‘Somaliland: Demand for International Recognition: A Policy Document of the Government of the Republic of Somaliland, 2001’ <<http://somalilandgov.com/new/wp-content/uploads/2012/06/somaliland-demand-for-international-recognition.pdf>> accessed 20 August 2014.

¹⁷⁵ Geldenhuys (n 34) 139.

¹⁷⁶ Arieff (n 171) 74.

¹⁷⁷ Ministry of Foreign Affairs (Kosovo), ‘Countries That Have Recognized the Republic of Kosova’ <<http://www.mfa-ks.net/?page=2,33>> accessed 20 August 2014.

¹⁷⁸ Ministry of Foreign Affairs (ROC), ‘Country with Whom We Currently Have Diplomatic Relations’ <<http://www.mofa.gov.tw/en/AlliesIndex.aspx>> accessed 20 August 2014.

¹⁷⁹ Ministry of Foreign Affairs (ROC), ‘IGOs in Which We Participate’ <<http://www.mofa.gov.tw/en/igo/Link3enigo.aspx?n=58BD38F4400A7167>> accessed 20 August 2014.

¹⁸⁰ Pegg (n 144) 37-38.

¹⁸¹ See eg Jorri Duursma, *Fragmentation and the International Relations of Micro-States: Self-Determination and Statehood* (CUP 1996) 386. (“The Holy See is not a State in international

with over 170 States and the European Union, and participates, either as a member or an observer, in various organisations, such as the UN, the Food and Agriculture Organization, the UN Educational, Scientific and Cultural Organization (UNESCO), the International Atomic Energy Agency, and the UN World Tourism Organization.¹⁸² Furthermore, it is also a party to two of the core international human rights treaties: the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the International Convention on the Rights of the Child (CRC). The Holy See thus falls outside the scope of the present research. In addition, in relation to treaties deposited with the Secretary-General of the UN, past practice has shown that entities that have acquired full membership in certain UN specialised agencies, albeit not admitted as members of the UN, have been allowed to become members of treaties that are open to participation by “all States”.¹⁸³ Thus, entities such as the Cook Islands are also excluded from the scope of the study.

Another entity excluded for the same reason is Palestine. On 31 October 2011, the General Conference of the UNESCO voted to admit Palestine as its 195th Member,¹⁸⁴ and it officially became a Member on 23 November of the same year.¹⁸⁵ Such a development suggests that Palestine would be allowed to participate in treaties deposited with the UN Secretary-General, including international human rights treaties. In April 2014, the UN confirmed that its Special Coordinator for the Middle East Peace Process received letters of accession to 15 international treaties from the

law, but has an international legal personality of its own which permits it to take international actions such as the conclusion of treaties and the maintenance of diplomatic relations.”)

¹⁸² For details on the foreign relations of the Holy See, including participation in international organisations, see The Holy See, ‘Bilateral and Multilateral Relations of the Holy See’ <http://www.vatican.va/roman_curia/secretariat_state/documents/rc_seg-st_20010123_holy-see-relations_en.html> accessed 20 August 2014.

¹⁸³ UN Treaty Section of the Office of Legal Affairs, ‘Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties’ (1999) UN Doc ST/LEG/7/Rev.1, 24.

¹⁸⁴ UNESCO General Conference 36 C/Res 76 (31 October 2011).

¹⁸⁵ UNESCO, ‘Palestine’ <<http://www.unesco.org/new/en/unesco/worldwide/arab-states/Palestine/>> accessed 20 August 2014.

Palestinian Authority,¹⁸⁶ including 7 of the core international human rights treaties and one optional protocol.¹⁸⁷ Five of the instruments (Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ICERD, CEDAW, Convention on the Rights of People with Disabilities (CRPD), and CRC) entered into force for Palestine on 2 May 2014, one (Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in armed conflict) on 7 May, and the two Covenants on 2 July.¹⁸⁸ Palestine, with its status as a UNESCO Member as well as members to the abovementioned international human rights treaties, would thus be excluded from the study.

C. Criteria Excluded from the Definition of “Unrecognised Entities”

Most of the non-Montevideo criteria of statehood are not included in this thesis’ definition of “unrecognised entities”. As discussed in Section II, disagreements exist as to whether those factors (permanence or stability, willingness and ability to observe international law, legality of establishment, and self-determination) should be considered additional criteria of statehood, and they are not helpful in locating the entities that this thesis seeks to analyse. In relation to the criterion of permanence, while permanence may serve as evidence of an entity’s fulfilment of traditional criteria of statehood, it is nevertheless not an independent criterion. Crawford provides a number of examples of short-lived States, including Zanzibar (a part of Tanzania), which from December 1963 to April 1964 was a State and a Member of the UN, and argues that their brief

¹⁸⁶ UN News Centre, ‘UN Confirms Receipt of Palestinian Applications to Join Global Conventions, Treaties’ (2 April 2014) <<http://www.un.org/apps/news/story.asp?NewsID=47490>> accessed 20 August 2014.

¹⁸⁷ UN OHCHR, ‘Press briefing notes on South Sudan, Ethiopia, United States, Palestine and Thailand / South East Asia’ (2 May 2014) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?LangID=E&NewsID=14556>> accessed 10 February 2015.

¹⁸⁸ For the record of Palestine’s accessions to these treaties, see United Nations Treaty Collection (UNTC), ‘<https://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&lang=en>’ accessed 10 February 2015.

existence did not automatically bar them from obtaining statehood.¹⁸⁹ The same may be said about unrecognised entities. Whether an entity is short-lived is irrelevant as long as the criteria of unrecognised entities set out above are indeed fulfilled during a limited period, meaning that the entity exercises control and affect the enjoyment of human rights of the population within its territory during that period, just as a State does in relation to its territory.

Turning to the other three criteria: Even in cases where an entity's control and power derive from acts in violation of international law, such as through unlawful use of force by a third State, or in a manner inconsistent with the principle of self-determination, the relationship between the entity in question and the population under its control still mirrors that between a State and its population. The TRNC, for instance, was established in the aftermath of the deployment of military forces by Turkey, and the use of force and the declaration of independence were condemned by the Republic of Cyprus as well as the UN.¹⁹⁰ In addition, it is generally perceived that the Chechen Republic cannot invoke the right to self-determination and secede from the Russian Federation.¹⁹¹ The declaration of independence by the Republic of Somaliland has also been considered a secessionist claim¹⁹² that cannot be justified by self-determination since the Somalilanders are not sufficiently distinct, ethnically or culturally, from the rest of the clans in Somalia.¹⁹³ Entities such as these would still be considered as "unrecognised entities" since the object of this research is to explore whether and how international human rights law can be applicable

¹⁸⁹ Crawford, *The Creation of States* (n 17) 90.

¹⁹⁰ UNGA Res 3212 (XXIX) (1 November 1974) UN Doc A/RES/3212(XXIX), para 2; UNSC Res 541 (18 November 1983) UN Doc S/RES/541.

¹⁹¹ Crawford, *The Creation of States* (n 17) 408-10.

¹⁹² *ibid* 403; Shaw (n 1) 237.

¹⁹³ Aaron Kreuter, 'Self-Determination, Sovereignty, and the Failure of States: Somaliland and the Case for Justified Secession' (2010) 19 Minnesota J Intl L 363, 386-87.

to entities with disputed status. No matter whether such entities are created in lawful manner or not, the human rights obligations assumed by their parent States or other States in the international community likely do not guarantee the rights of the individuals living their territories and subject to their control. Also, as the illegality surrounding the entities' claims to statehood generally neither influences their capabilities to administer the respective territories nor alters the nature of the relationship between the entities in question and the population subject to their governance, this research does not exclude entities from its scope solely because they are established through unlawful means. The same rationale explains the exclusion of the criterion of willingness and ability to observe international law. Yet, it is important to note that, the inability to observe international law may stem from the lack of governmental structure or functions. In such cases, the entity would not be considered an "unrecognised entity" because of its failure to fulfil one of the traditional criteria of statehood, government, rather than because of the lack of the additional criterion of ability to observe international law.

To sum up, the criteria of permanence or stability, willingness and ability to observe international law, legality of establishment, and self-determination, although potentially forming part of the criteria of statehood, are not used to define "unrecognised entities" since they do not help locate the entities that this thesis wishes to study.

IV. Conclusion

As the aim of the thesis is to explore the application of international human rights law to unrecognised entities, this chapter has provided an overview of the theories pertaining to international legal personality, statehood, and recognition. After all, despite the evolution of international law, States

remain the sole entity with full international legal personality and subject to the complete set of rules governing rights and obligations under international law, including international human rights law. As discussed in Section II of this chapter, various criteria have been proposed for the purpose of determining statehood, but many of them have not garnered the widespread support held by the Montevideo criteria. The issue of recognition is perhaps the most controversial one. Although the majority of international practice and scholarly opinion agree that recognition does not carry constitutive effect in terms of statehood, without recognition it is in fact difficult for an entity to interact with other States as an equal member of the international community and to enjoy rights and assume obligations in the same manner as other States. In order to further examine the status and international human rights obligations of “unrecognised entities”, such entities are defined as entities that fulfil the traditional criteria of statehood, or the “Montevideo criteria”, and achieve *de facto* independence but are not generally recognised as States by the international community. By adopting this definition, this thesis attempts to explore the status of these entities with State-like characteristics and whether the international legal order acknowledges the possibility of applying international human rights to these entities. Thus, the following chapters seek to examine the relationship between such entities and international human rights law, for the purpose of ultimately ascertaining its applicability to unrecognised entities, with a focus on the case of the ROC (Taiwan). Based on the approach laid down in Chapter 1, the next two chapters respectively explore the application of international human rights law arising from two primary sources of international law: treaties and general international law, with the next chapter focusing on treaty law.

CHAPTER 3

INTERNATIONAL HUMAN RIGHTS TREATIES

AND UNRECOGNISED ENTITIES

I. Introduction

While unrecognised entities are generally considered as not possessing the same rights and obligations as States do, this does not mean that these entities can freely act contrary to international law,¹ and the possibility for unrecognised entities, as defined in this thesis, to bear obligations under international human rights law has been raised.² In theory, the “parent States”³ bear the obligation under international human rights law to respect, protect and fulfil the rights of individuals within the territories currently governed by unrecognised entities. However, in practice, since the “parent States” do not exercise factual control over those territories, it is crucial to ascertain whether and to what extent the unrecognised entities are bound by rules of international human rights law. The present chapter will focus on the applicability of international human rights treaties, while the possibility of applying general international human rights law to unrecognised entities⁴ will be discussed in the next chapter.

¹ See Scott Pegg, *International Society and the De Facto State* (Ashgate 1998) 187-92.

² For instance, in 2005, the UN Commission on Human Rights Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living issued a statement urging the authorities in Taiwan to “ensure that the human rights of people affected by leprosy are fully respected” and “remind[ing] the authorities of their obligations under international human rights law”. UN OHCHR, ‘UN Experts Express Concern over Imminent Eviction of Taiwanese Residents in Lo-Sheng Sanatorium’ (20 July 2005) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=3329&LangID=E>> accessed 20 August 2014.

³ The term “parent State” is used here to refer to the State to which the territory of a given unrecognised entity *de jure* belongs. For instance, in the case of Somaliland, Somalia is the “parent State”. This term is first used in Chapter 2, Section III.

⁴ See eg *Kadić v Karadžić*, 70 F3d 232, 245 (2d Cir 1995). The Court stated that: “The customary international law of human rights, such as the proscription of official torture, applies to States without distinction between recognized and unrecognized States.”

The term “treaty” is most often associated with agreements concluded between States.⁵ However, it has long been recognised that treaties may be concluded by subjects of international law other than States, a fact reflected in international practice particularly since the Second World War.⁶ A wider definition for the term “treaty” was proposed in 1956 by Fitzmaurice, the then Special Rapporteur of the UN ILC on the topic of the law of treaties:

a treaty is an international agreement ... made between entities both or all of which are subjects of international law possessed of international personality and treaty-making capacity, and intended to create rights and obligations, or to establish relationships governed by international law.⁷

Similar definitions can also be found in the literature.⁸

While these definitions exclude agreements that are not governed by international law, Lauterpacht, Fitzmaurice’s predecessor as the ILC’s Special Rapporteur, was of the opinion that, “It is not the subjection of an agreement to international law which makes of it a treaty. It is its quality as a treaty which causes it to be regulated by international law”.⁹ According to this opinion, as long as an instrument fulfils other elements required by the definition of “treaty” (for instance, concluded between

⁵ Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331, arts 1-2.

⁶ See Section II of the present Chapter. See also Yves Le Bouthillier and Jean-François Bonin, ‘Article 3, Convention of 1969’ in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (OUP 2011) 66.

⁷ Yearbook of the International Law Commission, 1956, vol II (1956) UN Doc A/CN.4/SER.A/1956/Add.1, 107.

⁸ Eg “a consensual agreement between two or more subjects of international law intended to be and considered by the parties as binding and containing rules of conduct under international law for at least one of the parties”. Rudolf Bernhardt, ‘Treaties’ in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law*, instalment 7 (North-Holland 1987) 460.

⁹ Yearbook of the International Law Commission, 1953, vol II (1953) UN Doc A/CN.4/SER.A/1953/Add.1, 100.

States and in written form), even if parties to an agreement specify that it shall be governed by the domestic law of one of them, such an instrument should still be considered as a “treaty”. The ILC ultimately took the position that “the element of subjection to international law was so essential an aspect of a treaty ... that this should be expressly mentioned in any definition”.¹⁰ Yet it is important to point out that when an agreement is concluded between subjects of international law, even when such an agreement makes reference to municipal law, there is a presumption that the relationship between the parties is also governed by international law.¹¹ Such a presumption may be negated if the parties expressly stipulate that the agreement is entirely subject to municipal law.

In the field of human rights, most international and regional human rights treaties are only open to participation by States. Yet a trend of expanding their participation to other actors can be observed in recent years. For instance, the CRPD provides for the possibility of participation by “regional integration organizations”,¹² and the European Union (EU) indeed ratified the Convention on 5 January 2010.¹³ In addition, the European Convention on Human Rights (ECHR), through the adoption of Protocol 14, also stipulates the possibility for the EU to accede to the Convention,¹⁴ and negotiations regarding the EU’s accession are currently under way.¹⁵ In

¹⁰ Yearbook of the International Law Commission, 1959, vol II (1959) UN Doc A/CN.4/SER.A/1959/Add.1, 95.

¹¹ Philippe Gautier, ‘Article 2 Convention of 1969’ in Corten and Klein (eds) (n 6) 43; Robert Jennings, ‘General Course on Principles of International Law’ (1967) 121 *Recueil des Cours* 335, 531.

¹² Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3, art 42.

¹³ United Nations Treaty Collection (UNTC), ‘Chapter IV Human Rights: 15. Convention on the Rights of Persons with Disabilities’ <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsq_no=iv-15&chapter=4&lang=en> accessed 20 August 2014; European Commission, ‘EU Ratifies UN Convention on Disability Rights’ (5 January 2011) Press Release IP/11/4 <<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/4>> accessed 20 August 2014.

¹⁴ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) Protocol 14, art 17.

¹⁵ Recent progress of the negotiation is documented on the Council of Europe’s website. Council of Europe, ‘EU Accession to the European Convention on Human Rights’

evaluating the EU's accession to the ECHR, it has been argued that the urgency of accession has increased in recent years considering that the EU takes on many functions and powers that used to be performed by States.¹⁶

Under the 1969 Vienna Convention on the Law of Treaties (hereinafter the 1969 Vienna Convention) and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter the 1986 Vienna Convention), parties to a treaty must perform the obligations contained therein in good faith after the entry into force of said treaty.¹⁷ For a treaty to enter into force for the parties, the most essential elements are that the parties possess treaty-making capacity and that they express consent to be bound by the treaty.¹⁸ Therefore, this chapter will first examine whether unrecognised entities possess treaty-making capacity, taking into consideration the special characteristics of human rights treaties. This chapter will then explore the possible means for unrecognised entities to express consent to be bound by international human rights treaties.

For the purpose of this research, a treaty is defined as: a consensual agreement concluded between two or more *subjects of international law* in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation. The only difference between this definition and

<<http://hub.coe.int/what-we-do/human-rights/eu-accession-to-the-convention>> accessed 20 August 2014.

¹⁶ European Commission for Democracy through Law (Venice Commission), 'Comments on the Accession of the European Union/European Community to the European Convention on Human Rights, by Mr. Pieter van DIJK' (12 October 2007) CDL(2007)096, para 2.

¹⁷ Vienna Convention on the Law of Treaties (n 5) art 26; Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (adopted 21 March 1986) UN Doc A/CONF.129/15, art 26.

¹⁸ Vienna Convention on the Law of Treaties (n 5) Part II; Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (n 17) Part II.

those in the 1969 and 1986 Vienna Conventions is the category of actors who conclude such agreements. Based on this definition of a treaty, in this thesis, human rights treaties are the agreements that fit the definition above and whose object and purpose is to safeguard the human rights of individuals or groups,¹⁹ and “treaty-making capacity” refers to the “capacity of subjects of international law to conclude treaties or to participate in treaties as parties, including subsequently modifying and terminating such legal relationships”.²⁰ The following section introduces discussions regarding the treaty-making capacities of entities that are considered subjects of international law and whether, and if so to what extent, unrecognised entities possess such capacity.

II. Treaty-Making Capacity under International Law

While Article 1 of the 1969 Vienna Convention explicitly restricts the Convention’s scope of application to treaties concluded between States, the text, commentaries, and the drafting history of the Convention all demonstrate the intention to avoid this restriction being interpreted as refuting the legal effect of other categories of international agreements. In particular, Article 3 of the 1969 Vienna Convention recognises the possibility of the Convention’s application to “international agreements concluded between states and other subjects of international law or between such other subjects of international law”. The potential “analogous application” of some of the provisions of the 1969 Vienna Convention to other agreements “which are governed by international law”

¹⁹ For similar definitions/descriptions of human rights treaties, see Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011) 3; Matthew Craven, ‘Legal Differentiation and the Concept of the Human Rights Treaty in International Law’ (2000) 11 EJIL 489, 514; *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts 74 and 75)*, Advisory Opinion OC-2/82, Inter-American Court of Human Rights Series A No 2 (24 September 1984) para 30.

²⁰ See Hungdah Chiu, *The Capacity of International Organizations to Conclude Treaties* (Martinus Nijhoff Publishers 1966) 5.

has also been acknowledged in jurisprudence.²¹ For instance, in *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt Advisory Opinion*, the ICJ referred to certain provisions of the 1969 Vienna Convention,²² even though the agreement in question was concluded between a State and an international organisation and thus falls outside the scope of that Convention.

According to the ILC, the phrase “other subjects of international law” in Article 3 of the 1969 Vienna Convention “is designed to provide for treaties concluded by: (a) international organisations, (b) the Holy See, which enters into treaties on the same basis as States, and (c) other international entities, such as insurgents, which may in some circumstances enter into treaties”.²³ The drafting history of the 1969 and 1986 Vienna Conventions also saw discussions on the treaty-making capacity of members of a federal union²⁴ and the International Committee of the Red Cross.²⁵ Yet, the ILC explicitly proclaimed that individuals and corporations created under national law do not possess the “capacity to enter treaties” and “agreements governed by public international law”.²⁶ Whilst whether entities other than those mentioned above have treaty-making capacity remains subject to clarification, debate concerning the capacity of national

²¹ *BP Exploration Company (Libya) Limited v Government of the Libyan Arab Republic* (BP/Libya Concession Tribunal) (1973) 53 ILR 296, 332. See also Shabtai Rosenne, *Developments in the Law of Treaties 1945-1986* (CUP 1989) 27.

²² *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) [1980] ICJ Rep 73, 94-96.

²³ ILC, ‘Report of the International Law Commission Covering the Work of Its 14th Session’ (24 April-29 June 1962) UN Doc A/5209, 162. The treaty-making capacity of international organisations was later recognised in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

²⁴ Yearbook of the International Law Commission, 1966, vol II (1966) UN Doc A/CN.4/SER.A/1966/Add. 1, 192.

²⁵ ‘Documents of the Conference’ UN Conference on the Law of Treaties between States and International Organizations or between International Organizations (18 February-21 March 1986) UN Doc A/CONF.129/4, 9. See also Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers 2009) 103; Le Bouthillier and Bonin (n 6) 75.

²⁶ ILC, ‘Report of the International Law Commission Covering the Work of Its 14th Session’ (n 23) 5. See also *Anglo-Iranian Oil Company (UK v Iran)* (Preliminary Objections) [1952] ICJ Rep 112.

liberation movements (NLMS) ²⁷ and entities created to administer territories²⁸ has received particular attention in the literature.

Notably, in terms of treaty-making capacity, neither the 1969 nor the 1986 Vienna Conventions distinguishes between different categories of treaties, for instance, bilateral and multilateral, or normative and contractual. In fact, writers have commented that the process of codification of the law of treaties neglected the nature and development of multilateral treaties,²⁹ and the ILC has acknowledged that applying the same rules to bilateral and multilateral treaties seems “unsatisfactory”.³⁰ Although Waldock included a provision defining a “multilateral treaty” in his first report to the ILC on the law of treaties,³¹ the provision was eventually removed. It has been suggested that the failure to take into consideration the characteristics of multilateral treaties leads to difficulties in reconciling some provisions of the 1969 Vienna Convention with human rights treaties, which are largely multilateral in nature.³² For instance, many multilateral treaties, including human rights treaties, establish independent bodies for monitoring treaty implementation and carrying out functions involving interpreting treaty provisions, but such activity might not necessarily be considered as one of the factors to be taken into account for the purpose of treaty interpretation as stipulated in Articles 31 and 32 of the 1969 Vienna Convention.³³ It has also been suggested that “the overriding ‘contractual’

²⁷ Le Bouthillier and Bonin (n 6) 62; James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 123; Chris N. Okeke, *Controversial Subjects of Contemporary International Law* (Rotterdam UP 1974) 109-27.

²⁸ Villiger, *Commentary* (n 25) 103; Le Bouthillier and Bonin (n 6) 74.

²⁹ Theodor Meron, *The Humanization of International Law* (Martinus Nijhoff Publishers 2006) 187-91; Rosenne (n 21) 73, 83.

³⁰ ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission' (13 April 2006) UN Doc A/CN.4/L.682, 250.

³¹ Yearbook of the International Law Commission, 1962, vol II (1962) UN Doc A/CN.4/SER.A/1962/Add.1, 31.

³² Menno T Kamminga, 'Final Report on the Impact of International Human Rights Law on General International Law' in Menno T Kamminga and Martin Scheinin (eds), *The Impact of Human Rights Law on General International Law* (OUP 2009) 9.

³³ *ibid.* Yet, it has been argued that the interpretation adopted by treaty monitoring bodies

paradigm [seems] largely (if not wholly) inappropriate in the case of human rights treaties".³⁴ How the special characteristics of human rights treaties influence the notion of treaty-making capacity will be discussed in the next section.

The discussion below addresses the treaty-making capacity of three categories of subjects of international law that the ILC expressly referred to: States, international organisations, and insurgents. The first two categories are chosen since their treaty-making capacity is acknowledged in the 1969 and 1986 Vienna Conventions. The treaty-making capacity of insurgents is considered since, according to the ILC's commentary quoted above, it may be possible for agreements concluded by them to be bound by the same rules as those concluded by States. Additionally, the treaty-making capacity of two other types of international entities, NLMs and entities created to administer territories, will also be discussed, as their capacity to act at the international level has been much discussed and practice has seen numerous examples of agreements concluded between these entities and States. Whether or not these agreements can be classified as "treaties" will be explored as well.

A. Treaty-Making Capacity of States

In the discussion below, in addition to the treaty-making capacity of States, the capacity of the Holy See, members of a federal union, and dependant States is also analysed. The Holy See, according to the ILC, enters into treaties "on the same basis as States", and issues regarding the latter two

can be considered as "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" or "supplementary means of interpretation". International Law Association, Committee on International Human Rights Law and Practice, 'Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies' (2004) para 20 <<http://www.ila-hq.org/download.cfm/docid/3B0BF58A-C096-4113-830E8E1B5BC6DEC5>> accessed 20 August 2014.

³⁴ Craven, 'Legal Differentiation and the Concept of the Human Rights Treaty' (n 19) 497.

categories of entities were debated during the ILC's drafting of the provisions on the treaty-making capacity of States and the scope of application of the 1969 Vienna Convention.

1. Recognition of the Treaty-Making Capacity of States

Treaty-making capacity has long been considered one of the fundamental characteristics of sovereign States,³⁵ and the PCIJ in the *Case of the SS "Wimbledon"* expressly recognised that "the right of entering into international engagements is an attribute of State sovereignty".³⁶ The capacity of States to conclude treaties, as codified in Article 6 of the 1969 Vienna Convention, has been overwhelmingly recognised as a rule of customary international law.³⁷ The exercise of such capacity is only limited by rules of international law governing the validity of treaties.³⁸

In early versions of the draft articles on the law of treaties, the provision on treaty-making capacity sought to also cover the treaty-making capacity of subjects of international law other than States, such as members of a federal union and international organisations.³⁹ During the UN Conference on the Law of Treaties at Vienna that took place from 1968 to 1969, the

³⁵ Arnold D McNair, *The Law of Treaties* (2nd edn, OUP 1961) 35; Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law*, vol 1 (Introduction and Part 1) (9th edn, Longman 1992) 1217.

³⁶ *Case of the SS "Wimbledon"* (UK, France, Italy & Japan v Germany) [1923] PCIJ Rep Series A No 1, 25.

³⁷ Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester UP 1984) 21; Villiger, *Commentary* (n 25) 131; Daniel Turp and François Roch, 'Article 6: Convention of 1969' in Corten and Klein (eds) (n 6) 111.

³⁸ McNair (n 35) 35. For instance, States are not permitted to conclude treaties that conflict with a peremptory norm of general international law (*jus cogens*).

³⁹ Eg Article 3 of the 1962 draft articles on the law of treaties reads:

Article 3 Capacity to conclude treaties

1. Capacity to conclude treaties under international law is possessed by States and by other subjects of international law.
2. In a federal State, the capacity of the member states of a federal union to conclude treaties depends on the federal constitution.
3. In the case of international organizations, capacity to conclude treaties depends on the constitution of the organization concerned.

Yearbook of the International Law Commission, 1962, vol II (n 31) 164.

following provision (then draft Article 5) was put forward for the consideration of the Conference and was subject to much debate:⁴⁰

Article 5. Capacity of States to conclude treaties

1. Every State possesses capacity to conclude treaties.
2. States members of a federal union may possess a capacity to conclude treaties if such capacity is admitted by the federal constitution and within the limits there laid down.⁴¹

The necessity of such a provision was raised during the discussions within the ILC.⁴² Some members argued that since the Vienna Convention on Diplomatic Relations did not deal with the issue of capacity to enter into diplomatic relations, by analogy, there was no need to include a provision on treaty-making capacity in the law of treaties. Others disagreed, emphasising that the issue of capacity was of more significance in the law of treaties than in the law of diplomatic relations. When the draft provision quoted above was put forward for consideration at the UN Conference, the issue of necessity and appropriateness of including a provision on the treaty-making capacity of States received relatively little attention, and most discussions surrounded paragraph 2 of the draft Article, which was eventually deleted.⁴³ In the end, draft Article 5, containing only one

⁴⁰ See eg discussions during the 11th and 28th meetings of the Committee of the Whole during the first session of the UN Conference on the Law of Treaties ('Summary Records of the Plenary Meetings and of the Meetings and of the Meetings of the Committee of the Whole' UN Conference on the Law of Treaties, First Session (Vienna 26 March-24 May 1968) UN Doc A/CONF.39/11, 59-68 (Summary Records of the First Session of the UN Conference on the Law of Treaties) 148-50.) and the 7th plenary meeting of the second session ('Summary Records of the Plenary Meetings and of the Meetings and of the Meetings of the Committee of the Whole' UN Conference on the Law of Treaties, Second Session (Vienna 9 April-22 May 1969) UN Doc A/CONF.39/11/Add.1 (Summary Records of the Second Session of the UN Conference on the Law of Treaties) 6-16).

⁴¹ Yearbook of the International Law Commission, 1966, vol II (n 24) 178.

⁴² *ibid* 191.

⁴³ Summary Records of the Second Session of the UN Conference on the Law of Treaties (n 40) 15, para 50 (7th plenary meeting). The treaty-making capacity of members of a federal union will be discussed under Section II.A.5.

paragraph on the treaty-making capacity of States, was adopted by 88 votes to 5, with 10 abstentions.⁴⁴

2. Rationale behind Recognising the Treaty-Making Capacity of States

As draft Article 5 of the 1969 Vienna Convention in its original form quoted above referred to the treaty-making capacity of members of federal unions and of international organisations, much discussion was devoted to whether it was appropriate to include such references and how to best formulate the provision, rather than the capacity of States in this regard. Although the drafting history of the 1969 Vienna Convention provides little explanation regarding the rationale behind granting treaty-making capacity to States, its Preamble does offer certain clues.

While most of the preambular language relates to the need to codify a convention on the law of treaties, the first two preambular paragraphs are useful in inferring the rationale behind recognising the capacity of States to enter into treaties. These two paragraphs highlight “the fundamental role of treaties in the history of international relations” and “the ever-increasing importance of treaties as a source of international law and as a means of developing peaceful co-operation among nations”.⁴⁵ In this regard, treaties, as a form of interaction between States, have become indispensable in international relations and even exerted gradually increasing influence on the lives of individuals. With the vast development in technology and communications, more issues have called for “inter-State regulation”, and treaties, as a source of international law, are vital tools in promoting peaceful coexistence and amicable cooperation in the

⁴⁴ *ibid* 15, para 51.

⁴⁵ Vienna Convention on the Law of Treaties (n 5) preamble, paras 1-2.

international community.⁴⁶ States, as the principal actors at the international level, must possess the capacity to establish bilateral or multilateral relationships with other States and other subjects of international law, creating rights and obligations that facilitate cooperation and serve the common aims of the contracting parties.

3. The Notion of a "State"

The 1969 Vienna Convention, while affirming the treaty-making capacity of States, does not provide a definition for the term "State". The ILC's commentaries to draft Article 5, quoted above, indicate that the term is used to express "the same meaning as in the Charter of the United Nations, the Statute of the Court [ICJ], the Geneva Conventions on the Law of the Sea and the Vienna Convention on Diplomatic Relations", and that "it means a State for the purposes of international law".⁴⁷ In addition, Article 77(1) of the 1969 Vienna Convention outlines the functions of depositaries, including interactions with "States entitled to become parties to the treaty", but neither the Convention nor the ILC commentaries give further guidance on how such eligibility should be determined. In practice, depositaries of treaties, such as the UN Secretary-General⁴⁸ and Switzerland (as depositary of the 1874 Treaty of Bern establishing the Universal Postal Union and of the 1949 Geneva Conventions, for instance⁴⁹), often undertake the task of determining eligibility when an entity seeks to become a party to a treaty deposited with them.

⁴⁶ Malcolm N Shaw, *International Law* (6th edn, CUP 2008) 94.

⁴⁷ Yearbook of the International Law Commission, 1966, vol II (n 24) 192.

⁴⁸ UN Treaty Section of the Office of Legal Affairs, 'Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties' (1999) UN Doc ST/LEG/7/Rev.1, para 73.

⁴⁹ Relevant practice is introduced in Fatsah Ouguergouz, Santiago Villalpando, and Jason Morgan-Foster, 'Article 77 Convention of 1969' in Corten and Klein (eds) (n 6) 1738.

In terms of treaties adopting the “Vienna formula”, that is, unequivocally providing for the participation of member States of the UN, specialised agencies, and the International Atomic Energy Agency and parties to the ICJ Statute, the depositaries would have little difficulty in ascertaining whether an entity would be eligible to become a party.⁵⁰ However, treaties adopting the “all States formula”, opening participation to *all* States, are more problematic because when an entity not covered by the Vienna formula seeks to participate in a treaty, the “all States formula” leaves it to the depositary to determine whether the entity is a State. Past practice suggests that when the UN Secretary-General encounters difficulties in deciding the eligibility of an entity he often seeks guidance from the practice of the General Assembly.⁵¹ An example of such practice can be found in General Assembly Resolution 3067, which explicitly refers to the “Republic of Guinea-Bissau” and the “Democratic Republic of Viet Nam” as “States” that were invited to the Third United Nations Conference on the Law of the Sea, even though at the time the two “States” did not comply with the “Vienna formula”.⁵² If the Secretary-General cannot rely on past practice of the General Assembly, a request will be issued to seek an opinion from the General Assembly.⁵³ To date, such a request has not taken place.

More recently, however, a controversy emerged when the Government of Palestine lodged a declaration accepting the jurisdiction of the International Criminal Court (ICC). While Article 12 of the Rome Statute of the

⁵⁰ Eg Article 81 of the 1969 Vienna Convention:

The present Convention shall be open for signature by all States Members of the United Nations or of any of the specialized agencies or of the International Atomic Energy Agency or parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a party to the Convention....

⁵¹ UN Treaty Section of the Office of Legal Affairs (n 48) para 81.

⁵² UNGA Res 3067 (XXVIII) (16 November 1973) UN Doc A/RES/3067(XXVIII), para 7.

⁵³ UN Treaty Section of the Office of Legal Affairs (n 48) para 82.

International Criminal Court stipulates that a "State" can accept the jurisdiction of the Court, and Article 125 adopts the "all States formula", the Statute does not define the term. The Office of the Prosecutor of the ICC observed that, though Palestine has been recognised as a State by more than 130 States and certain international organisations, it is still designated by the UN General Assembly as an "observer", rather than a "Non-member State".⁵⁴ Acknowledging that it is not authorised by the Rome Statute to determine whether Palestine is a "State", the Office of the Prosecutor came to the conclusion that it would only consider the situation in Palestine if competent UN organs (namely the Security Council or the General Assembly) or the Assembly of States Parties of the Rome Statute eventually "resolve the legal issue relevant to an assessment of article 12" or if the Security Council refers the situation in Palestine to the Prosecutor according to Article 13(b) of the Rome Statutes.⁵⁵

4. The Special Case of the Holy See

Although according to the ILC the Holy See enters into treaties "on the same basis as States", it in fact falls under the category of "other subjects of international law" for the purpose of Article 3 of the 1969 Vienna Convention.⁵⁶ Different hypotheses have been put forward to support the Holy See's treaty-making capacity. For instance, some have justified the capacity on the basis of the Holy See's territorial sovereignty over the Vatican City.⁵⁷ However, this thesis has been rejected by the ILC, stating

⁵⁴ Office of the Prosecutor of the International Criminal Court, 'Situation in Palestine' <<http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf>> accessed 20 August 2014.

⁵⁵ *ibid.* For a compilation of critiques of the approach taken by the Office of the Prosecutor, see Global Legal Monitor, 'International Criminal Court: Prosecutor Declares It Lacks Jurisdiction to Determine Whether Palestine Is a State' (13 April 2012) <http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205403091_text> accessed 20 August 2014.

⁵⁶ ILC, 'Report of the International Law Commission Covering the Work of Its 14th Session' (n 23) 162.

⁵⁷ Le Bouthillier and Bonin (n 6) 72 (citing Francesco Capotorti, 'Cours général de droit international public' (1994) 248 Recueil des Cours 9, 58).

that "treaties entered into by the Papacy are normally entered into not in virtue of its territorial sovereignty over the Vatican State, but on behalf of the Holy See, which exists separately from that state".⁵⁸ During the drafting of the 1969 Vienna Convention, some members of the ILC regarded it unnecessary to consider such controversies since no matter whether the entity is considered as the Holy See or as the Vatican City there has been a general consensus that it possesses "international juridical personality and the capacity to conclude international treaties".⁵⁹ While the status of the Holy See and its relationship with the Vatican City has been the subject of much discussion, the ILC nevertheless recognised the capacity of the Holy See to enter into treaties "on the same basis as States".⁶⁰ In practice, the Holy See has ratified or acceded to many multilateral treaties, such as the 1949 Geneva Conventions, the CRC, and the Convention on Cluster Munitions, and concluded bilateral treaties, or "concordats", with various States.⁶¹

5. Members of a Federal Union

As noted earlier, the treaty-making capacity of members of a federal union was originally acknowledged in draft Article 5 (current Article 6) of the 1969 Vienna Convention, with draft Article 5(2) providing that "States members of a federal union may possess a capacity to conclude treaties if such capacity is admitted by the federal constitution and within the limits there laid down". The deletion of the paragraph was not necessarily motivated by the denial of such a capacity, but by the fear that such a

⁵⁸ Yearbook of the International Law Commission, 1959, vol II (n 10) 96.

⁵⁹ Yearbook of the International Law Commission, 1962, vol I (1962) UN Doc A/C.N.4/SER.A/1962, 267 (Statements of Mr Tunkin and of Mr Bartoš at the 669th Meeting, 27 June 1962).

⁶⁰ ILC, 'Report of the International Law Commission Covering the Work of Its 14th Session' (n 23) 162.

⁶¹ For discussion on the conclusion of concordats, see Cedric Ryngaert, 'The Legal Status of the Holy See' (2011) 3 Goettingen J Intl L 829, 844-49.

provision might be dangerous and too intrusive in the domestic affairs of federal States.⁶² For instance, during the UN Conference on the Law of Treaties, the Canadian delegation pointed out that the provision posed a real and serious danger “in situations like that of Canada, where the constitution was largely unwritten and where constitutional practice was as important as the written documents”.⁶³ The delegation’s concern mainly stemmed from the provision’s failure to specify who was competent to interpret the federal constitution, which might lead to other States presuming to interpret the constitution of federal State in question.⁶⁴ Also, the delegation of Viet Nam stated that the provision “might be regarded as an attempt to interfere in essentially domestic matters”.⁶⁵

The ILC commentary to this draft provision stipulates that in certain circumstances, the constitution of a federal State allows its members to possess treaty-making capacity. While acknowledging the possibility for two federal members of one federal State to conclude agreements, the ILC is clear in stating that this paragraph only concerned treaties between a federal member and an outside State.⁶⁶ However, it is evident from the discussions in the ILC, as well as the position of State delegations in the 1968-1969 Vienna Conference, that in cases where members of a federal union possessed the capacity to conclude treaties, such capacity in fact stems from the treaty-making capacity vested exclusively in the federal government as the representative of the State, and the former’s capacity

⁶² See Turp and Roch (n 37) 109-10; P Brazil, ‘Some Reflections on the Vienna Convention on the Law of Treaties’ (1975) 6 *Federal L Rev* 223, 229.

⁶³ Summary Records of the Second Session of the UN Conference on the Law of Treaties (n 40) 7 (7th plenary meeting).

⁶⁴ *ibid* 6-7.

⁶⁵ Summary Records of the First Session of the UN Conference on the Law of Treaties (n 40) 60-68 (11th meeting of the Committee of the Whole).

⁶⁶ Yearbook of the International Law Commission, 1966, vol II (n 24) 192.

would always be confined by the constitution and relevant practice of that federal State.⁶⁷

6. The Issue of Dependent States

An earlier version of the draft articles on the law of treaties also dealt with the treaty-making capacity of dependent States, "the conduct of whose international relations has been entrusted to another State".⁶⁸ In Waldock's report to the ILC, draft Article 3 acknowledged the possibility for a dependent State to possess treaty-making capacity if such capacity is provided for in the arrangement between it and the State entrusted to conduct its foreign relations, and that other parties to the treaty in question agreed to the participation of the dependent State in its own name.⁶⁹ However, some members of the Commission considered that entities such as protectorates and colonies "were in the process of disappearing" and their existence "might be incompatible with the principles of modern international law", and thus the ILC should not consider issues regarding these entities.⁷⁰ Thus, the ILC eventually deleted the reference to dependant States.

B. Treaty-Making Capacity of International Organisations

1. Recognition of the Treaty-Making Capacity of International Organisations

As reflected in the discussions prior to the adoption of the two Vienna Conventions on the Law of Treaties, as well as the definition ultimately

⁶⁷ Yearbook of the International Law Commission, 1966, vol II (n 24) 192.

⁶⁸ Yearbook of the International Law Commission, 1962, vol II (n 31) 36 ('First Report on the Law of Treaties by Sir Humphrey Waldock' (26 March 1962) UN Doc A/CN.4/144).

⁶⁹ *ibid.*

⁷⁰ *ibid.* 57-71, 193-94, 240-43; Oliver J. Lissitzyn, 'Territorial Entities other than Independent States in the Law of Treaties' (1968) 125 *Recueil des Cours* 1, 19.

agreed upon for the 1986 Vienna Convention, "international organisation" means an inter-governmental organisation.⁷¹ The term includes "an organisation composed mainly of States, and in some cases having associate members which are not yet States or which may even be other international organizations".⁷²

The practice of international organisations concluding treaties with States or other international organisation dates back to the 19th Century, with the headquarters agreement between the International Committee of Weight and Measures and France often cited as the earliest example.⁷³ Since the end of the Second World War, the numbers of international organisations and international agreements to which they are parties have increased. During the preliminary discussions of the ILC on the topic of the law of treaties in 1950, it appeared that the majority of the Commission supported including in the ILC study agreements to which international organisations were parties.⁷⁴ However, considering that the number of such agreements at the time remained limited, the ILC took the decision that the Commission should leave aside "the question of the capacity of international organizations to make treaties, and that it should draft the articles with reference to States" and revisit the issue of whether the rules could be applied to international organisations later.⁷⁵ When the ILC reconsidered this issue in 1962, although it again decided to "defer examination of the treaties entered into by international organizations", it was also acknowledged that "international agreements to which

⁷¹ Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 March 1986, UN Doc A/CONF.129/15 (not yet in force), art 2(1)(i).

⁷² Yearbook of the International Law Commission, 1974, vol II(1) (1974) UN Doc A/CN.4/SER.A/1974/Add.1 (Part 1), 295-96.

⁷³ See eg Chiu, *The Capacity of International Organizations* (n 20) 6.

⁷⁴ Yearbook of the International Law Commission, 1950, vol II (1950) UN Doc A/CN.4/SER.A/1950/Add.1, 381.

⁷⁵ Yearbook of the International Law Commission, 1951, vol I (1951) UN Doc A/CN.4/SER.A/1951, 136.

organizations are parties to fall within the scope of the law of treaties".⁷⁶ In the draft articles adopted by the ILC in 1966, the scope of the articles was confined to agreements concluded between States.⁷⁷ It was expected that attempting to include rules governing treaties concluded by international organisations would "unduly complicate and delay the drafting" of the law of treaties,⁷⁸ and the 1966 draft articles were the version eventually submitted for consideration at the Vienna Conference on the Law of Treaties.

The number of international agreements with international organisations as parties grew over time. By 1969, according to the Sixth Committee of the UN General Assembly, the number of such agreements amounted to approximately 20 per cent of all the multilateral treaties in force.⁷⁹ The increase in number and importance of such agreements may have led to some relevant discussions in the 1968 Vienna Conference. During the conference many delegations questioned the exclusion of agreements concluded between States and international organisations and even proposed amendments to reinstate the reference to "other subjects of international law".⁸⁰ Waldock, serving as Expert Consultant of the Vienna Conference, reiterated the ILC's concern that "the task of framing the fundamental law governing treaties was so heavy in itself that in the interests of clarity it would be preferable to restrict the articles to treaties between States".⁸¹ Per the suggestion of the Swedish delegation,⁸² the issue was eventually resolved in the form of a resolution recommending

⁷⁶ Yearbook of the International Law Commission, 1962, vol II (n 31) 161.

⁷⁷ Yearbook of the International Law Commission, 1966, vol II (n 24) 187.

⁷⁸ *ibid* 187.

⁷⁹ UN GAOR 24th Session (1969) UN Doc A/7746 (1969) Annexes, Agenda Item 86, para 110.

⁸⁰ Eg Summary Records of the First Session of the UN Conference on the Law of Treaties (n 40) 11 (Statement of Mr Kearny (US) at the 1st meeting of the Committee of the Whole). See also Rosenne (n 21) 20-21.

⁸¹ Summary Records of the First Session of the UN Conference on the Law of Treaties (n 40) 20 (3rd meeting of the Committee of the Whole).

⁸² *ibid* 20 (Statements of Mr Blix (Sweden) at the 3rd meeting of the Committee of the Whole).

the General Assembly request the ILC study the question of treaties concluded between States and international organisations and between international organisations.⁸³ Subsequently, the General Assembly adopted Resolution 2501, recommending the ILC study this question in consultation with the principal international organisations.⁸⁴ The final set of draft articles adopted by the ILC⁸⁵ were submitted for the consideration of the UN Conference on the Law of Treaties between States and International Organizations or between International Organizations, held in Vienna in 1986,⁸⁶ and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations was adopted on 20 March 1986 and opened for signature the next day.⁸⁷

The treaty-making capacity of international organisations was formally recognised in the 1986 Vienna Convention. The Preamble notes that international organisations “possess the capacity to conclude treaties, which is necessary for the exercise of their functions and the fulfilment of their purposes”, whilst Article 6 provides that: “the capacity of an international organization to conclude treaties is governed by the rules of that organization”. Prior to the codification of the 1986 Vienna Convention, international practice,⁸⁸ jurisprudence,⁸⁹ and scholarly writings⁹⁰ also provided evidence of such capacity.⁹¹ One of the earliest analyses of the

⁸³ *ibid* 59 (11th meeting of the Committee of the Whole).

⁸⁴ UNGA Res 2501 (XXIV) (12 November 1969) UN Doc A/RES/2501(XXIV), para 5.

⁸⁵ Yearbook of the International Law Commission, 1982, vol II(2) (1982) UN Doc A/CN.4/SER.A/1982/Add.1 (Part 2), 17-77.

⁸⁶ UNGA Res 39/86 (13 December 1984) UN Doc A/RES/39/86, para 5.

⁸⁷ ‘Final Act of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations’ (21 March 1986) UN Doc A/CONF.129/14, para 19.

⁸⁸ Eg agreements relating to the Seat of the League of Nations, as cited in Chiu, *The Capacity of International Organizations* (n 20) 12.

⁸⁹ Eg *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174 (*Reparation Advisory Opinion*).

⁹⁰ Eg McNair (n 35) 50-52; Chiu, *The Capacity of International Organizations* (n 20) 6-19.

⁹¹ For a compilation of such evidence, see Yearbook of the International Law Commission, 1972, vol II (1972) UN Doc A/CN.4/SER.A/1972/Add.1, 173-76.

international status of international organisations can be found in the ICJ's *Reparation for Injuries Suffered in the Service of the United Nations Advisory Opinion*.⁹² When faced with the question of whether the UN had "the capacity to bring an international claim against the responsible *de jure* or *de facto* government' to obtain reparation for damages due to injuries suffered by its agents "in circumstances involving the responsibility of a State",⁹³ the ICJ considered the characteristics of the UN and enquired whether the UN possessed international personality. The Court approached these issues by examining the provisions of the UN Charter in order to ascertain if Member States of the UN had intended the organisation to possess international rights and duties. The Court found that "the attribution of international personality is indispensable" for the UN to achieve the purposes and functions set out in the Charter.⁹⁴ Furthermore, the Court affirmed that the UN possessed the capacity to operate upon an international plane and was endowed with the competence necessary to discharge its functions, including through the conclusion of agreements.⁹⁵

In addition to the UN, the capacity to enter into treaties of the League of Nations was also affirmed by the ICJ in the 1962 *South West Africa Case*, where the Court held that the Mandate for South West Africa

is a special type of instrument ... [that] incorporates a definite agreement consisting in the conferment and acceptance of a Mandate It is an instrument having the character of a treaty or convention and embodying international engagements

⁹² *Reparation Advisory Opinion* (n 89).

⁹³ UNGA Res 258 (III) (3 December 1948) UN Doc A/RES/258(III).

⁹⁴ *Reparation Advisory Opinion* (n 89) 178-79.

⁹⁵ *ibid* 179.

for the Mandatory as defined by the Council and accepted by the Mandatory.⁹⁶

At the regional level, jurisprudence of the European Court of Justice (ECJ) has also recognised that the negotiation and conclusion of agreements by the European Community with third States is necessary for the full discharge of its functions (regarding international transport) and that it possessed treaty-making capacity.⁹⁷ Thus, an agreement concluded by the European Commission created binding legal obligations for the European Community under international law.⁹⁸ Therefore, under modern international law, the capacity of international organisations to conclude treaties is beyond doubt.⁹⁹

2. Rationale behind Granting Treaty-Making Capacity to International Organisations

Various theses have been developed to explain the rationale behind granting international organisations treaty-making capacity. In the ILC debates, there were essentially two schools of thought: the first viewing such capacity as inherent to any international organisation; and the second deriving such capacity from the delegation of authority by member States, either through the constitutive instruments or through later practice.¹⁰⁰ This debate continued among the delegations participating in the 1986 UN Conference on the Law of Treaties between States and International

⁹⁶ *South West Africa (Ethiopia v South Africa; Liberia v South Africa)* (Preliminary Objections) [1962] ICJ Rep 319, 331.

⁹⁷ *Commission v Council of the European Economic Community (ERTA)* [1971] ECR 263, 273-75.

⁹⁸ *France v Commission* [1994] ECR I-3641. See also Jan Klabbbers, 'Presumptive Personality: The European Union in International Law' in Martti Koskenniemi (ed), *International Law Aspect of the European Union* (Kluwer Law Intl 1998) 250-51.

⁹⁹ Jennings and Watts (eds) (n 35) 1219.

¹⁰⁰ See Yearbook of the International Law Commission, 1982, vol II(2) (n 85) 13. See also Nicolas Levrat, 'Article 6, Convention of 1986' in Corten and Klein (eds) (n 6) 118.

Organizations or between International Organizations.¹⁰¹ The first school argued that international organisations could not exist without the capacity to conclude treaties. For instance, some members of the ILC argued that international organisations must be attached to the territory of States and therefore must possess the capacity to conclude headquarters agreements with the respective States.¹⁰² Such capacity derived from international law, and it should not be based on internal rules of the organisations, which reflected the will of member States.¹⁰³ The second school, on the contrary, considered that an international organisation “almost always had to be limited by the purposes for which it had been set up”, and an organisation “possessed only what had been given to it” by its member States.¹⁰⁴ By way of compromise, the wording of Article 6 of the 1986 Vienna Convention was phrased to encompass both perspectives: the capacity is “governed by” the rules of that international organisation, rather than “based on”.¹⁰⁵ As explained by certain members of the ILC, the purpose of a provision on the capacity to conclude treaties was to define the extent of the capacity, rather than the source of that capacity.¹⁰⁶

When determining the extent of treaty-making capacity of an international organisation, the first point of reference should be the “rules of that organization”,¹⁰⁷ in particular, its “constitution”.¹⁰⁸ As argued by one

¹⁰¹ ‘Summary Records of the Plenary Meetings and of the Meetings and of the Meetings of the Committee of the Whole’ UN Conference on the Law of Treaties between States and International Organizations or between International Organizations (Vienna 18 February-21 March 1986) UN Doc A/CONF.129/16 (Vol. I), 61-68. See also GE do Nascimento e Silva, ‘The 1986 Vienna Convention and the Treaty-Making Power of International Organizations’ (1986) 29 German YB Intl L 69, 74-75.

¹⁰² Yearbook of the International Law Commission, 1974, vol I (1974) UN Doc A/CN.4/SER.A/1974, 136 (para 51), 148 (para 33) (statements by Mr Ushakov and Mr El-Erian).

¹⁰³ *ibid* 136, para 53 (statement by Mr Tammes).

¹⁰⁴ *ibid* 149, paras 47, 49 (statement by Mr Quentin-Baxter).

¹⁰⁵ Yearbook of the International Law Commission, 1981, vol. II(2) (1981) UN Doc A/CN.4/SER.A/1981/Add.1 (Part 2), 127.

¹⁰⁶ Yearbook of the International Law Commission, 1974, vol I (n 102) 149 (para 45), 151 (para 60) (statement by Mr Bilge and Mr Sette Câmara).

¹⁰⁷ Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (n 17) art 6.

member of the ILC in 1974,¹⁰⁹ international organisations are established by States to pursue common objectives that cannot be achieved by States themselves, and capacities, including treaty-making capacity, are granted to international organisations to carry out the functions necessary to enable achievement of those objectives.¹¹⁰ In this regard, an organisation's constituent instrument, decisions of its competent organs, and other rules within the organisation determine the limit of the organisation's capacity to conclude treaties.¹¹¹ This corresponds to the ICJ's opinion in the *Reparation Advisory Opinion* that the capacities of an international organisation depend on its implied powers. Although the ICJ only set out to answer questions concerning the capacities of the UN in a particular context, it has been argued that considering the Court's approach, the arguments are potentially applicable to other international organisations.¹¹²

In addition to the constitution of each international organisation, some refer to the notion of "international personality" as a basis of the treaty-making capacity of international organisations.¹¹³ It has been argued that international practice demonstrates that international organisations, as subjects of international law, possess inherent powers, and their capacity is not confined by their constitutions.¹¹⁴ Proponents of this view point to

¹⁰⁸ ILC, 'Report of the International Law Commission Covering the Work of Its 14th Session' (n 23) 164.

¹⁰⁹ Yearbook of the International Law Commission, 1974, vol I (n 102) 149, para 45 (statement by Mr Bilge).

¹¹⁰ See also *Reparation Advisory Opinion* (n 89) 179; J W Schneider, *Treaty-Making Power of International Organizations* (Librairie Droz 1963) 135.

¹¹¹ ILC, 'Report of the International Law Commission Covering the Work of Its 14th Session' (n 23) 164.

¹¹² Schneider (n 110) 138 (arguing that since the constituent instrument of the UN did not contain provision explicitly granting the organisation treaty-making capacity, the ICJ had to resort to a reasoning of implied powers, which was also applicable to other organisations).

¹¹³ See eg Chiu, *The Capacity of International Organizations* (n 20) 22-24; Gunther Hartmann, 'The Capacity of International Organizations to Conclude Treaties' in K Zemanek (ed), *Agreements of International Organizations and the Vienna Convention on the Law of Treaties* (Springer-Verlag 1971) 131-40; José Alvarez, *International Organizations as Law-Makers* (OUP 2005) 136.

¹¹⁴ Finn Seyersted, 'Objective International Personality of Intergovernmental Organizations:

the examples of acts of international organisations that are not specifically authorised by their constituent instruments but are nevertheless considered legitimate. Such examples include the capacity to conclude treaties, the sending and receiving of diplomatic representatives, convening conferences of plenipotentiary representatives of States, bringing international claims, and other acts that are generally not regulated in the constitution of international organisations.¹¹⁵ In other words, international organisations acquire international personality and necessary capacities not by the consent of their member States but by the mere fact of their existence, which is contingent upon its ability to function.¹¹⁶

When evaluating the validity of the two theories forming the bases of the treaty-making capacity of international organisations, constitution and international personality, the former seems to have garnered prevailing support.¹¹⁷ As pointed out by Waldock in his first Special Rapporteur report to the ILC, while “all entities having treaty-making capacity necessarily have international personality, it does not follow that all international persons have treaty-making capacity”.¹¹⁸ This is further affirmed by scholarly opinion, which regards that there is no necessary nexus between international personality and treaty-making capacity.¹¹⁹ While conflicting views remain with regard to the issue of the basis of the treaty-making capacity of international organisations, a consensus can be observed from the discussions within the ILC and the 1986 Vienna

Do Their Capacities Really Depend upon the Conventions Establishing Them?’ (1964) 34 *Nordisk Tidsskrift Intl Ret* 3, 28; Finn Seyersted, ‘United Nations Forces - Some Legal Problems’ (1961) 37 *British YB Intl L* 351, 453.

¹¹⁵ Seyersted, ‘Objective International Personality of Intergovernmental Organizations?’ (n 114) 21-27.

¹¹⁶ Hartmann (n 113) 136.

¹¹⁷ Anne Peters, ‘Treaty Making Power’ in Rüdiger Wolfrum (ed), *Encyclopedia of Public International Law*, vol X (OUP 2012) 63-64

¹¹⁸ Yearbook of the International Law Commission, 1962, vol II (n 31) 36.

¹¹⁹ Hartmann (n 113) 140; Chiu, *The Capacity of International Organizations* (n 20) 29.

Conference, as well as scholarly writings, that such capacity has been generally recognised. As for the extent of treaty-making capacity of an international organisation, in addition to the limits posed by “rules of that organization”, it might be useful to recall the opinion of the ICJ in the *Reparation Advisory Opinion* that the nature and capacities of a subject of international law “[depend] upon the needs of the community” and the “requirements of international life”.¹²⁰

C. Treaty-Making Capacity of Insurgents

1. Recognition of Treaty-Making Capacity of Insurgents

According to the ILC, the phrase “other subjects of international law” in Article 3 of the 1969 Vienna Convention includes “insurgents”.¹²¹ Sir Gerald Fitzmaurice, the third Special Rapporteur of the ILC on the topic of the law of treaties, pointed out in his report to the ILC that “insurgents to whom belligerent rights ha[d] been accorded” had a certain degree of international personality and possessed treaty-making capacity within the limits outlined by the scope of their personality.¹²² This view was later affirmed by his successor,¹²³ yet some members of the ILC took a more cautious approach and emphasised that not all insurgents had treaty-making capacity.¹²⁴ Although recognition of belligerency is rarely granted,¹²⁵ the ILC seemed to regard it as a prerequisite for insurgents to possess treaty-making capacity. Yet, it has been argued that prior recognition of belligerency is not necessary since such recognition can be

¹²⁰ *Reparation Advisory Opinion* (n 89) 176.

¹²¹ ILC, ‘Report of the International Law Commission Covering the Work of Its 14th Session’ (n 23) 162.

¹²² Yearbook of the International Law Commission, 1958, vol II (1958) UN Doc A/CN.4/SER.A/1958/Add.1, 32, para 22.

¹²³ Yearbook of the International Law Commission, 1962, vol I (n 59) 58, para 6 (statement of Sir Humphrey Waldock).

¹²⁴ *ibid* 66, paras 22, 26 (statements of Mr de Luna and Mr Ago).

¹²⁵ Antonio Cassese, *International Law* (2nd edn, OUP 2005) 126.

implied by the very act of concluding an agreement.¹²⁶ In addition, Common Article 3 of the 1949 Geneva Conventions, which encourages parties to the conflict to “further endeavour to bring into force, by means of special agreements, all or part of the other provisions” of the Geneva Conventions,¹²⁷ has also been invoked as evidence of the treaty-making capacity of insurgents.¹²⁸

Questions have been raised regarding the legal status of agreements concluded with insurgents and whether they form a part of the international legal order. For instance, the Constitutional Court of Colombia, while reviewing the constitutionality of Additional Protocol II of the 1949 Geneva Conventions and the Colombian law approving it, ruled that the “special agreements” referred to in Common Article 3 should not be considered “treaties” in the strict sense because they were not concluded between “entities subject to public international law”.¹²⁹ This thesis takes the position that the status of any agreement concluded with insurgents is in fact contingent upon the conditions surrounding the conclusion of the agreement and its content. Even if the agreement explicitly refers to international standards and involves international actors, it might not be categorised as a treaty.¹³⁰ Neither does it necessarily reflect the will of the parties that the agreement concluded should be governed by international law. The determination of whether parties to an agreement intended to create an international legal obligation depends on the terms of the agreement concerned and on the way it is implemented

¹²⁶ Peters (n 117) 68.

¹²⁷ Paragraph 3 of Common Article 3(3).

¹²⁸ Peters (n 117) 68.

¹²⁹ *Colombian Constitutional Court, Ruling No C-225/95*, Re: File No LAT-040 (unofficial translation reprinted in Marco Sassòli, Antoine A. Bouvier, and Anne Quintin, *How Does Law Protect in War?*, vol III (3rd edn, ICRC 2011) Case No 243).

¹³⁰ Christine Bell, *Peace Agreements and Human Rights* (OUP 2000) 305.

after its conclusion.¹³¹ In addition, the attitude of other actors at the international level can also be observed to ascertain the perceived legal nature of the agreements concluded with insurgents. The involvement, or even signatures, of representatives of international organisations and/or foreign States has been suggested as an indicator that the agreement between a State and other parties to an internal armed conflict has been internationalised, thus creating binding obligations under international law.¹³² As examples, agreements concluded in the context of two different conflicts are analysed below. The opinion of international institutions and scholars concerning these agreements reflects the different approaches taken to determine the legal nature of an agreement concluded between a State and a non-State armed group.

The first example is the Lusaka Protocol, which was concluded between the government of Angola and the União Nacional para a Independência Total de Angola (National Union for the Total Independence of Angola; UNITA), one of the major rebel groups in the civil war. A civil war broke out in Angola in the 1970s and continued for over two decades. In 1991, a set of documents, known as the "Acordos de Paz" (Peace Accords), aiming to establish peace were concluded between Angola and UNITA. In reaching agreement between the two parties, the process of mediation was led by Portugal, with the participation of the US and the Soviet Union as observers.¹³³ When UNITA failed to implement the commitments in the 1991 Peace Accords and resumed military activities, the UN Security Council adopted Resolution 851 demanding that UNITA "abide fully" by the

¹³¹ Olivier Corten and Pierre Klein, 'Are Agreements between States and Non-State Entities Rooted in the International Legal Order?' in Enzo Cannizzaro (ed), *The Law of Treaties beyond the Vienna Convention* (OUP 2011) 10, 23.

¹³² P H Kooijmans, 'The Security Council and Non-State Entities as Parties to Conflicts' in Karel Wellens (ed), *International Law: Theory and Practice: Essays in Honour of Eric Suy* (Martinus Nijhoff Publishers 1998) 338.

¹³³ Peace Accords for Angola (1 May 1991) UN Doc S/22609, Annex.

1991 agreements.¹³⁴ In 1994, Angola and UNITA concluded the Lusaka Protocol, which embodied the 1991 Peace Accords and was signed by the warring parties, the mediator of the peace process, the Special Representative of the UN Secretary-General in Angola, with the presence of observers: the US, the Russian Federation, and Portugal.¹³⁵ When UNITA failed to comply with the Lusaka Protocol, the Security Council, through Resolution 1127, adopted stronger language and demanded that UNITA “implement immediately its obligations under the Lusaka Protocol”.¹³⁶ The resolution also specified enforcement measures such as travel bans for UNITA senior officials and closure of UNITA offices in foreign territories and expressed the Security Council’s “readiness to consider the imposition of additional measures, such as trade and financial restrictions, if UNITA does not fully comply with its obligations under the Lusaka Protocol”.¹³⁷

Regarding the legal status of the Lusaka Protocol, some have suggested that the terms used in the Protocol were ambiguous and did not reflect the will of the parties to establish binding legal obligations.¹³⁸ In particular, it has been noted that a 2002 memorandum of understanding concluded by Angola and UNITA identified the Lusaka Protocol as a “political-judicial instrument” for the resolution of the conflict in Angola.¹³⁹ Yet, considering the involvement of other States and the UN in the process of concluding the Protocol and the actions taken by the UN Security Council in response to UNITA’s failure to implement the Protocol, Kooijmans holds the view that the Lusaka Protocol has indeed created international legal

¹³⁴ UNSC Res 851 (15 July 1993) UN Doc S/RES/851, para 4.

¹³⁵ Lusaka Protocol (15 November 1994) UN Doc S/1994/1441, Annex.

¹³⁶ UNSC Res 1127 (28 August 1996) UN Doc S/RES/1127, para 2.

¹³⁷ *ibid* para 9.

¹³⁸ Corten and Klein (n 131) 13-14.

¹³⁹ ‘Identical Letters Dated 25 April 2002 from the Permanent Representative of Angola to the United Nations Addressed to the Secretary-General and the President of the Security Council’ (26 April 2002) UN Doc S/2002/483, Annex, Preamble.

obligations.¹⁴⁰ He further argues that non-State entities involved in a conflict that results in the conclusion of “internationalized peace agreements” and attracts the Security Council’s concern should be considered capable of entering into binding agreements under international law.¹⁴¹

However, the Appeals Chamber of the Special Court of Sierra Leone held a different view when it considered the nature of the Lomé Agreement between the government of Sierra Leone and a rebel group, the Revolutionary United Front (RUF). The armed conflict between the Sierra Leone forces and the RUF began in 1991. Although in 1996 a peace agreement was reached between the two parties to the conflict,¹⁴² the initiative eventually failed and the Lomé Agreement was concluded in 1999. Notably, the Lomé Agreement designated a number of international actors, including the government of Togo, the UN, the Organisation of African Unity, the Economic Community of West African States, and the Commonwealth of Nations, as “Moral Guarantors” of the implementation of the Agreement by both parties.¹⁴³ In *Prosecutor v Kallon and Kamara*, the Appeals Chamber of the Special Court of Sierra Leone noted Kooijman’s view outlined above. Yet, it ruled that the involvement of foreign States or international organisations as mediators, facilitators of peace processes, or “moral guarantors” did not alter the nature of the agreements concluded with non-State armed groups, and these agreements remained governed by domestic law.¹⁴⁴ The Chamber went on to reason that even if an agreement sought to bring an end to an internal conflict that affected the

¹⁴⁰ Kooijmans (n 132) 337-38.

¹⁴¹ *ibid* 338.

¹⁴² Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone (30 November 1996) UN Doc S/1996/1034, Annex.

¹⁴³ Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (7 July 1999) UN Doc S/1999/777, Annex, art 34.

¹⁴⁴ *Prosecutor v Kallon and Kamara* (Decision on Challenge to Jurisdiction: Lomé Accord Amnesty) SCSL-2004-15-AR72(E) and SCSL-2004-15-AR72(E) (13 March 2004) paras 39-42.

peace and security of the international community, an issue that would be of concern for the Security Council, such characteristics would not lead to the creation of international legal obligations.¹⁴⁵ Regarding the issue of treaty-making capacity of insurgents, the Appeals Chamber explicitly pronounced that no evidence suggested that international law has vested the insurgents with treaty-making capacity, and, even though the government of Sierra Leone considered the RUF “as an entity with which it could enter into an agreement”, the Lomé Agreement should not be considered a treaty.¹⁴⁶

Commenting on the decision of the Special Court, Cassese held a different opinion and argued that the Lomé Agreement is an international treaty.¹⁴⁷ He drew such a conclusion from both the characteristics of the RUF and from the text of the agreement. On the one hand, insurgents may acquire treaty-making capacity under international law if “they show effective control over some part of the territory and the armed conflict is large-scale and protracted”.¹⁴⁸ On the other hand, the text of the agreement reflects the intention of the parties to create binding international legal obligation.¹⁴⁹ This thesis subscribes to the view expressed by Kooijmans and Cassese and considers that there is indeed evidence supporting the treaty-making capacity of insurgents, such as the acknowledgement in the ILC’s discussions and final commentaries to Article 3 of the 1969 Vienna Convention previously mentioned. Also, the abundant practice of concluding agreements with insurgents with the use of obligatory

¹⁴⁵ *ibid* para 42.

¹⁴⁶ *ibid* paras 47-49.

¹⁴⁷ Antonio Cassese, ‘The Special Court and International Law: The Decision Concerning the Lomé Agreement Amnesty’ (2004) 2 *J Intl Crim Justice* 1130, 1134-35.

¹⁴⁸ *ibid* 1134.

¹⁴⁹ *ibid* 1135.

language¹⁵⁰ demonstrates the intention of parties, States and insurgent groups, to establish binding obligations under international law.

2. Rationale behind Granting Treaty-Making Capacity to Insurgents

The rationale for recognising the treaty-making capacity of insurgents might be inferred from the following two features: a) the emphasis on the requirement of effective control over certain territories; and b) the proposed limit to treaty-making capacity. Firstly, both the ILC¹⁵¹ and scholarly writings¹⁵² emphasise that for insurgents to possess treaty-making capacity, they must exercise *de facto* control over certain territories. This requirement of territorial control corresponds to the principle of effectiveness.¹⁵³ In practice, entities displaying State-like features are sometimes granted capacity to enter into treaty relations, especially those representing peoples entitled to exercise the right to self-determination.¹⁵⁴ Secondly, it has been suggested that insurgents can only conclude treaties regarding the conduct of warfare.¹⁵⁵ In order to regulate the situation of armed conflicts and to minimise the atrocities brought about by the use of force, it is crucial that there is a channel for creating rights and obligations for parties engaged in conflict. This argument is also supported by the commentary to Common Article 3 of the

¹⁵⁰ For examples of such agreements, see Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012) 124-32. One of the examples introduced is the 2002 Agreement on the Protection of Civilians and Civilian Facilities from Military Attack between Sudan and the Sudan People's Liberation Movement, which "reconfirm[s] [the parties'] obligations under international law, including common Article 3 of the 1949 Geneva Conventions, to take constant care to protect the civilian population, civilians and civilian objects against the dangers arising from military operations".

¹⁵¹ Yearbook of the International Law Commission, 1958, vol II (n 122) 32, para 22.

¹⁵² Cassese, *International Law* (n 125) 127-28.

¹⁵³ Jann K Kleffner, 'The Applicability of International Humanitarian Law to Organized Armed Groups' (2011) 93 Intl Rev Red Cross 443, 451-54.

¹⁵⁴ See Anthea Roberts and Sandesh Sivakumaran, 'Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law' (2012) 37 Yale J Intl L 107, 120-21.

¹⁵⁵ See eg Yearbook of the International Law Commission, 1958, vol II (n 122) 32, para 22; Cassese, *International Law* (n 125) 127-28.

Geneva Conventions, which states that in cases where an internal conflict escalates,

[i]t becomes desirable to settle in detail the treatment [victims of war] are to receive, the relief which is to be brought to them, and various other matters. ... Although the only provisions which each of the Parties is bound to apply unilaterally are those contained in Article 3, they are nevertheless under an obligation to try to bring about a fuller application of the Convention by means of a bilateral agreement.¹⁵⁶

Evidence also suggests that when armed groups are allowed to participate in the process of law creation, by the conclusion of agreements between armed groups and international organisations, for instance, the overall compliance with rules of international humanitarian law would improve.¹⁵⁷ Against this background, it can be argued that the limits of the treaty-making capacity of insurgents echoes the notion of necessity in relation to determining the capacity of an international entity to act at the international level, as pronounced by the ICJ in the *Reparation Advisory Opinion*. In other words, since the necessity of allowing insurgents to conclude treaties arises from the need to regulate armed conflicts and to alleviate the damages suffered by victims of war, it follows that their treaty-making capacity is restricted to matters regarding conduct of warfare.

D. Treaty-Making Capacity of other International Entities

1. National Liberation Movements

¹⁵⁶ Oscar Uhler and Henri Coursier, *Commentary on the Geneva Conventions of 12 August 1949*, vol IV (ICRC 1958) 42.

¹⁵⁷ Roberts and Sivakumaran (n 154) 126-32.

While NLMs may sometimes have other labels, such as belligerent communities, they are given special status under international law because of their fight against colonial domination, racist regimes, or alien occupation in the exercise of the right to self-determination.¹⁵⁸ In other words, their status derives from the motivation behind their struggle and their representation of “peoples” entitled to self-determination, and such status provides them with a range of rights and duties under international law.¹⁵⁹ In particular, the legitimacy of the fight against colonial domination and the exercise of the right to self-determination in this regard has been repeatedly recognised by the UN General Assembly.¹⁶⁰

The treaty-making capacity of NLMs has been acknowledged in the literature¹⁶¹ and most notably provided for explicitly in the First Additional Protocol to the 1949 Geneva Conventions (API). Article 1(4) of API expands the notion of international armed conflict to include armed conflicts involving NLMs. For the NLMs involved in such conflicts, Article 96(3) of API provides that the authority representing a people engaged in a war of national liberation can express its intention to be bound by the 1949 Geneva Conventions and API through the submission of a declaration to the depositary of API. The same provision also stipulates that, following the depositary’s receipt of such a declaration, the Geneva Conventions and API immediately apply to the conflict involving the NLM in question, and the Geneva Conventions and API become equally binding upon all parties to the conflict.

¹⁵⁸ Cassese, *International Law* (n 125) 140.

¹⁵⁹ Ian Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 62-63; Crawford, *Brownlie’s Principles* (n 27) 123-24.

¹⁶⁰ UNGA Res 2105 (XX) (20 December 1965) UN Doc A/RES/2105(XX); Declaration on Principles of International Law Concerning friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970) UN Doc A/RES/2625.

¹⁶¹ Brownlie, *Principles* (n 159) 62; Crawford, *Brownlie’s Principles* (n 27) 123; Kirsten Schmalenbach, ‘Article 3. International Agreements not within the Scope of the Present Convention’ in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012) 68.

While Articles 1(4) and 96(3) of API provide for the possibility for NLMs to assume the same rights and obligations as those assumed by a State party to the Geneva Conventions and API, practice suggests that these provisions have had little effect. Firstly, armed conflicts prior to the adoption of API already demonstrated that NLMs were willing to make unilateral declarations expressing an undertaking to apply provisions of the Geneva Conventions.¹⁶² Secondly, to date the depositary has not received any qualified declarations, mostly because States against which NLMs are fighting have not ratified API.¹⁶³

The reason behind the special status of NLMs and the conferral of treaty-making capacity in some circumstances largely stems from their representation of peoples exercising the right to self-determination.¹⁶⁴ Since international law recognises the legitimacy of a people exercising this right, authorities representing such peoples have been recognised as capable of performing certain acts that are considered as necessary to their struggle.

2. Entities Created to Administer Territories

While the precise definition of “international territorial administration” varies, it generally denotes the exercise of administering authority over a particular territory, on a temporary basis, by a formally-constituted international entity that performs executive, judicial and legislative

¹⁶² Ioannis Kalpouzos, ‘The Applicability of International Law to Armed Conflicts Involving Non-State Armed Groups: Between Status and Humanitarian Protection’ (PhD thesis, University of Nottingham 2010) 151-52.

¹⁶³ Christopher Greenwood, ‘Customary Law Status of the 1977 Geneva Protocols’ in Astrid J. M. Delissen and Gerard J. Tanja (eds), *Humanitarian Law of Armed Conflict Challenges Ahead: Essays in Honour of Frits Kalshoven* (Martinus Nijhoff Publishers 1991) 112; Noelle Higgins, *Regulating the Use of Force in Wars of National Liberation – The Need for a New Regime* (Martinus Nijhoff Publishers 2010) 119.

¹⁶⁴ Kalpouzos (n 162) 141-51.

activities for the benefit of that territory.¹⁶⁵ The administration of the Free City of Danzig by the League of Nations is one of the early examples of international territorial administration, and the UN administration of Kosovo and East Timor are more contemporary examples.

Entities established for the purpose of administering or supervising certain territories, often created under the auspices of international organisations, have sometimes been vested with treaty-making capacity.¹⁶⁶ In order to be bound by treaty obligations, international territorial administrations have been given powers to conclude treaties, accede to existing treaties, or functionally succeed treaty obligations of the former regime.¹⁶⁷ The second power may be problematic considering treaty amendments might be necessary to allow participation of international territorial administrations or the international organisations in charge of the administration, and the temporary nature of such administrations also renders accession to existing treaties an inappropriate technique. The last method, functional succession, refers to the continuation of treaty obligations pertaining to the provisions relevant to the functions of the territorial administration. The case of the United Nations Interim Administration Mission in Kosovo (UNMIK) provides an example in this context. UNMIK reported to the Human Rights Committee, on the implementation of the ICCPR in 2006 and to the Committee on Economic, Social and Cultural Rights, on the implementation of the ICESCR in 2008. When explaining the role that UNMIK was expected to play, the Human Rights Committee invoked the concept of continuity of obligations and opined that UNMIK is bound to respect and ensure the rights provided in

¹⁶⁵ Carsten Stahn, *The Law and Practice of International Territorial Administration: Versailles to Iraq and Beyond* (CUP 2008) 44-45; Ralph Wilde, *International Territorial Administration: How Trusteeship and Civilizing Mission Never Went Away* (OUP 2008) 21-22.

¹⁶⁶ Lissitzyn (n 70) 7.

¹⁶⁷ Stahn (n 165) 491-96.

the ICCPR because the former regime, Serbia, was a party to the Covenant.¹⁶⁸

The rationale behind granting treaty-making capacity to international territorial administrations and the basis for their exercise of authority generally derives from the consent and delegation of authority by the territorial sovereign.¹⁶⁹ In addition, since international territorial administrations are often created by international organisations, arguments concerning international organisations have also been made to justify the treaty-making capacity of international territorial administrations. Such arguments point out that international organisations are established by States, which vested certain organs within the organisations the power to make decisions and exercise functions for the aim of maintaining peace and security. The UN Security Council is a case in point, and its establishment or endorsement of territorial administration is based on the implied consent by Member States of the UN.¹⁷⁰ In other words, the legitimacy of the international territorial administration projects authorised by the Security Council may rest on the Security Council's Chapter VII mandate, which has been accepted by all UN Members as they joined the organisation. Such implied acceptance differentiates the international territorial administrations from unlawful intervention and "illegal colonialism".¹⁷¹

III. The Capacity of Unrecognised Entities to Conclude or Participate in International Human Rights Treaties

¹⁶⁸ UN Human Rights Committee, 'Concluding Observations of the Human Rights Committee: Kosovo (Serbia)' (14 August 2006) UN Doc CCPR/C/UNK/CO/1, para 4.

¹⁶⁹ Stahn (n 165) 519-22.

¹⁷⁰ Wilde, *International Territorial Administration* (n 165) 402-03.

¹⁷¹ *ibid.* See also Henry Richardson, "'Failed States", Self-Determination, and Preventative Diplomacy: Colonialist Nostalgia and Democratic Expectations' (1996) 10 Temple Intl & Comp LJ 1, 53.

As the aim of this thesis is to explore the application of international human rights law to unrecognised entities, this section does not seek to argue that unrecognised entities possess treaty-making capacity as a matter of international law in general and thus should be considered as capable of entering into every category of treaties under international law. Instead, the discussion below focuses on the treaty-making capacity of unrecognised entities with regards to international human rights treaties, drawing upon the analysis in the previous section. Additionally, the arguments presented below reflect the special characteristics of international human rights treaties, especially with respect to the issue of continuity of treaty obligations and the requirement of a national system to respect, protect, and fulfil the rights set out in human rights treaties.

It is argued that there are two bases for granting unrecognised entities treaty-making capacity with regards to international human rights treaties. The first basis relates to the theories concerning the effect of State recognition: the constitutive theory and the declaratory theory.¹⁷² The latter, that is the declaratory theory,¹⁷³ seems to have garnered prevalent support from both the literature and State practice.¹⁷⁴ The declaratory theory argues that the act of recognition is independent from the consideration of statehood.¹⁷⁵ That is, a new State is created when the factual conditions are in conformity with the requirements of statehood, and recognition from other States serves merely as an acknowledgment of

¹⁷² For a more detailed discussion of the theories of recognition, see Chapter 2, Section II.B.

¹⁷³ H Lauterpacht, *Recognition in International Law* (CUP 1948) 38; John Dugard, *Recognition and the United Nations* (Grotius Publication Ltd 1987) 7. See also Ti-Chiang Chen, *The International Law of Recognition: With Special Reference to Practice in Great Britain and the United States* (L C Green ed, Frederick A Praeger Inc. 1951) 30-78.

¹⁷⁴ Stefan Talmon, 'The Constitutive Versus the Declaratory Theory of Recognition: *Tertium Non Datur*' (2004) 75 British YB Intl L 101, 105. For examples of such support, see J L Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (Humphrey Waldock ed, 6th edn, OUP 1963) 139; Ian Brownlie, 'Recognition in Theory and Practice' (1982) 53 British YB Intl L 197, 205-06; Vaughan Lowe, *International Law* (OUP 2007) 161; Shaw (n 46) 447.

¹⁷⁵ Lauterpacht, *Recognition* (n 173) 43-51.

the fact. According to this declaratory theory, the lack of recognition received by unrecognised entities would not bar them from obtaining statehood. Since unrecognised entities fulfil the criteria of statehood, they are therefore vested with the capacity to conclude or participate in international human rights treaties due to their status as a State. While the lack of general recognition does not necessarily prevent unrecognised entities from concluding international agreements,¹⁷⁶ it might lead to the refusal of the depositaries of treaties to receive instruments of accession in practice.¹⁷⁷

Another argument builds on the notion of necessity set out by the ICJ in the *Reparation Advisory Opinion* in determining the capacities of a subject of international law to act on the international plane and will now be considered in detail. The discussion below will first consider why it is necessary, from the point of view of the international community, to grant unrecognised entities the capacity to conclude or participate in international human rights treaties. Then the section will move on to introduce how the notion of necessity further relates to the principles of continuity of international human rights treaty obligations and of international legal personality and whether these principles serve to strengthen the necessity argument to support granting unrecognised entities treaty-making capacity in relation to international human rights treaties. Lastly, possible concerns in this regard will be discussed to examine whether they are sufficient to prevent unrecognised entities from concluding or participating in international human rights treaties.

¹⁷⁶ Randolph R Sean, 'The Status of Agreements between the American Institute in Taiwan and the Coordination Council for North American Affairs' (1981) 15 Intl Lawyer 249, 258-59.

¹⁷⁷ See Section II.3 of the present chapter.

A. Rationale behind Acknowledging the Capacity of Unrecognised Entities to Conclude or to Participate in International Human Rights Human Rights Treaties: The Needs of the International Society

1. The Necessity to Allow Unrecognised Entities to Conclude or to Participate in International Human Rights Treaties

a. The Notion of Necessity, or "the Needs of the Community"

In view of the discussions in Section II, it is arguable that the rationale behind granting treaty-making capacity to States, international organisations, and insurgents relates more closely to the notion of necessity, or in the words of the ICJ "the needs of the community",¹⁷⁸ than the inherent characteristics of those subjects of international law. While in the *Reparation Advisory Opinion*, the ICJ was asked to provide an opinion regarding the UN's capacity to bring international claims, the Court did lay down general rules regarding how to determine whether an entity possesses international legal personality and to what extent that entity possesses capacities to operate on the international plane. Noting that "the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights", the ICJ opined that the precise nature of a subject of international law is determined by "the needs of the community".¹⁷⁹ For an international organisation, since it is established by States to achieve certain purposes and aims, the capacities it possesses to act at the international level are those "necessitated by the discharge of its functions".¹⁸⁰

¹⁷⁸ *Reparation Advisory Opinion* (n 89) 176.

¹⁷⁹ *ibid* 178.

¹⁸⁰ *ibid* 180.

While the ICJ adopted the notion of “community” in its evaluation of the necessity to allow international organisations to possess certain capacities, it did not elaborate on the meaning of the term. Although the ICJ indeed stated that UN Member States, 50 at the time, “represent[ed] the vast majority of the members of the international community”,¹⁸¹ this by no means suggests that the “international community” consists exclusively of UN Member States or States in general.

The ICJ has subsequently employed the term “international community” in a number of cases. For instance, in the *Barcelona Traction Case*, the ICJ described obligations *erga omnes* as “obligations of a State towards the international community as a whole”.¹⁸² Another example can be found in the *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion*, where the ICJ repeatedly referred to the term “international community”.¹⁸³ However, it appears that the Court has not attempted to define the term, and it has even been argued that the term was at times “devoid of any legal substance”.¹⁸⁴ Scholarly writings have provide insights in this regard.¹⁸⁵ For instance, Franck characterised a community as “a social system of continuing interaction and transaction” and “based ... on a common, conscious system of reciprocity between its constituents”,¹⁸⁶ and according to Simma, the term “international community” is often

¹⁸¹ *ibid* 185.

¹⁸² *Case Concerning the Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain)* [1970] ICJ Rep 3, para 33.

¹⁸³ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, paras 62, 67, 73, 82, 96, 100, 103. Examples of such references include “the members of the international community are profoundly divided on the matter of whether non-recourse to nuclear weapons over the past 50 years constitutes the expression of an *opinio juris*” (para 67); “the adoption [of UNGA resolutions] ... requesting the member States to conclude a convention prohibiting the use of nuclear weapons in any circumstance, reveals the desire of a very large section of the international community to take ... a significant step forward along the road to complete nuclear disarmament” (para 73); and “182 States parties to the Treaty on the Non-Proliferation of Nuclear Weapons, or, in other words, the vast majority of the international community” (para 100).

¹⁸⁴ Gleider I Hernández, ‘A Reluctant Guardian: The International Court of Justice and the Concept of “International Community”’ (2013) 83 British YB Intl L 13, 34.

¹⁸⁵ Eg Dino Kritsiotis, ‘Imagining the International Community’ (2002) 13 EJIL 961.

¹⁸⁶ Thomas M Franck, *Fairness in International Law and Institutions* (OUP 1995) 10.

invoked to “denote the repository of interests that transcend individual States *ut singuli* and thus are not ... comprehensible within the classic bilateralist paradigm”.¹⁸⁷ Additionally, many have argued that, while States are no doubt members of the international community, the concept extends beyond States and encompasses non-State entities,¹⁸⁸ including individuals.¹⁸⁹ It has also been argued that States and non-State entities play complementary roles in protecting general interests of the international community, including in the field of human rights.¹⁹⁰ The participation of various actors in the international community changes according to “the nature of the issue involved ... and the requirements of international life” and “cannot be solely determined by States”.¹⁹¹

Although there seems to be an absence of a uniform definition of “international community”, this does not mean that the test of necessity laid down in the *Reparation Advisory Opinion* is inoperable. In its illustration of how the “needs of the community” determine the nature and capacities of subjects of international law, the ICJ stated that

the development of international law has been influenced by the requirements of international life, and the progressive increase

¹⁸⁷ Bruno Simma, ‘From Bilateralism to Community Interest in International Law’ (1994) 250 *Recueil des Cours* 217, 244 (referring to “community of States”, “international community”, and “humankind”); Bruno Simma and Andreas L. Paulus, ‘The “International Community”: Facing the Challenge of Globalization’ (1998) 9 *EJIL* 266, 268 (referring to “international community” only).

¹⁸⁸ Eg Robert McCorquodale, ‘An Inclusive International Legal System’ (2004) 17 *Leiden J Intl L* 477, 481; James Crawford, ‘Responsibility to the International Community as a Whole’ (2001) 8 *Indiana J Global Legal Studies* 303, 314; Hermann Mosler, *The International Society as a Legal Community* (Sijthoff & Noordhoff 1980) 11-14.

¹⁸⁹ Robert McCorquodale, ‘Beyond State Sovereignty: The International Legal System and Non-State Participants’ (2006) 8 *Intl L: Revista Colombiana de Derecho Internacional* 103, 118; Giorgio Gaja, ‘The Protection of General Interests in the International Community, General Course on Public International Law’ (2012) 364 *Recueil des Cours* 9, 23; Robert McCorquodale, ‘The Individual and the International Legal System’ in Malcolm D Evans (ed), *International Law* (4th edn, OUP 2014) 282-84.

¹⁹⁰ Gaja (n 189) 32-33.

¹⁹¹ Robert McCorquodale, ‘International Community and State Sovereignty: An Uneasy Symbiotic Relationship’ in Colin Warbrick and Stephen Tierney (eds), *Towards an International Legal Community: The Sovereignty of States and the Sovereignty of International Law* (British Institute of International and Comparative Law 2006) 256.

in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States.¹⁹²

While this was presented in the context of international organisations, similar arguments have been made in relation to other non-State entities.¹⁹³ It has been argued that the personalities and capacities of such entities should be acknowledged if they are perceived as “performing functions which can be regarded as useful for international society itself”, and the basis of such acknowledgment is the “society’s needs for the development of international cooperation and the furtherance of the ends of the international community”.¹⁹⁴

Questions then arise as to who determines the “needs of the community” or the “ends of the international community” and how such determination should be made. The ICJ, or its predecessor the PCIJ, has often been referred to as the institution with the competence to rule on issues concerning the common interests and values of the international community.¹⁹⁵ While, as mentioned above, the ICJ has indeed referred to the notion of “international community” in its decisions, it has not discussed the *needs* of the international community or the notion of necessity in any context other than the examination of personality and capacities of international organisations in the *Reparation Advisory Opinion*. Considering that it is difficult for unrecognised entities to have access to

¹⁹² *Reparation Advisory Opinion* (n 89) 178.

¹⁹³ Anne Hsiu-An Hsiao, ‘The International Legal Status of Unrecognized Claimants to Statehood: A Comparative Analysis of Taiwan and the Turkish Republic of Northern Cyprus’ (2011) 47(1) *Issues & Studies* 1, 10; Tiyanjana Maluwa, ‘The Holy See and the Concept of International Legal Personality: Some Reflections’ (1986) 19 *Comp & Intl LJ Southern Africa* 1, 11-16.

¹⁹⁴ Maluwa (n 193) 12.

¹⁹⁵ Hernández (n 184) 13, 24 (citing H Lauterpacht, ‘Règles générales du droit de la paix’ (1937) 62 *Recueil des Cours* 95, 308.); Georges Abi-Saab, ‘The International Court as a World Court’ in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (CUP 1996) 7.

the ICJ,¹⁹⁶ it is conceivable that the Court would hardly have the opportunity to rule on whether the notion of necessity justifies acknowledging legal capacities of these entities. Therefore, the plausible approach would be to build on the Court's reasoning in the *Reparation Advisory Opinion* and take into consideration of relevant practice at the international level to determine whether the needs of the international community can serve as a basis for the capacity of unrecognised entities to conclude or participate in international human rights treaties.¹⁹⁷

b. Applying the Notion of Necessity to Unrecognised Entities

Turning to unrecognised entities, in order to determine whether they possess treaty-making capacity and the extent of such capacity, consideration should be given to the necessity, from the point of view of the international community, of allowing unrecognised entities to hold rights and bear obligations under international law. Support for such necessity stems from the observation that only through granting certain capacities to unrecognised entities can rules of international law be applied to the territories controlled by these entities.¹⁹⁸ In the field of human rights, it has been argued that it is increasingly necessary to include unrecognised entities in the international legal framework,¹⁹⁹ given that such entities exert effective authority over certain territories.²⁰⁰ The

¹⁹⁶ According to Article 35(1) of the ICJ Statute, the Court is "open to the states parties to the present Statute". While it is possible for a non-UN Member State to become a party to the Statute (Article 93(2) of the UN Charter) and for the Court to be open to a State whose not a party to the Statute (Article 35(2) of the ICJ Statute), these conditions require the approval/recommendation by the General Assembly and/or Security Council, thus making it difficult for unrecognized entities to have access to the ICJ.

¹⁹⁷ See Maluwa (n 193) 12.

¹⁹⁸ D P O'Connell, *International Law*, vol 1 (2nd edn, Stevens & Sons Ltd 1970) 86; Finn Seyersted, 'International Personality of International Organisations: Do Their Capacities Really Depend upon Their Constitutions?' (1964) 4 *Indiana J Intl L* 1, 42.

¹⁹⁹ Michael Schoiswohl, *Status and (Human Rights) Obligations of Non-Recognized De Facto Regimes in International Law: The Case of 'Somaliland'* (Martinus Nijhoff Publishers 2004) 235.

²⁰⁰ See Anthony Cullen and Steven Wheatley, 'The Human Rights of Individuals in *De Facto* Regimes under the European Convention on Human Rights' (2013) 13 *Human Rights L Rev* 691, 720 (arguing that: "[o]ne of the requirements of the international community, reflected

existing international legal framework for the protection of human rights contains insufficient regulations for the conduct of non-State actors, including unrecognised entities,²⁰¹ and by allowing unrecognised entities to participate in international human rights treaties some of these gaps in protection can be filled.

The necessity of allowing unrecognised entities to participate in international human rights treaties also stems from a number of characteristics unique to such treaties. As international law imposes obligations on States and other actors, the duty bearers usually enjoy discretion as to how to discharge such obligations.²⁰² Yet many international human rights treaties stipulate the manner in which obligations should be implemented, and human rights bodies have often interpreted that the rights provided in the respective instruments must be respected, protected, and fulfilled.²⁰³ Firstly, the duty to “respect” limits the exercise of governmental authority.²⁰⁴ In other words, it is a negative obligation under which parties to human rights treaties must refrain from violations of human rights.²⁰⁵ Secondly, the duty to “protect” demands that parties exercise due diligence in order to prevent individuals from being subjected to human rights violations committed by private actors. In addition, in cases where violations have occurred, measures must be taken to respond to the situation, including through investigation and punishment,

in the adoption of numerous declarations and instruments on the importance of a universal conception of human rights, is for the effective guarantee of human rights to individuals”).

²⁰¹ Angela Hegarty and Siobhan Leonard, *Human Rights: An Agenda for the 21st Century* (Cavendish 1999) 63.

²⁰² Frédéric Mégret, ‘Nature of Obligations’ in Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran (eds), *International Human Rights Law* (2nd edn, OUP 2014) 101.

²⁰³ Eg UN Committee on Economic, Social and Cultural Rights, ‘General Comment No. 12’ in ‘Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies’ (27 May 2008) UN Doc HRI/GEN/1/Rev.9 (Vol. I) 58, para 15.

²⁰⁴ *The Word “Laws” in Article 30 of the American Convention on Human Rights*, Advisory Opinion OC-6/86, Inter-American Court of Human Rights Series A No 6 (9 May 1986) para 21.

²⁰⁵ UN Human Rights Committee, ‘General Comment No. 31’ in ‘Compilation of General Comments’ (n 203) 244, para 6.

so that the perpetrators are not allowed to act with impunity.²⁰⁶ Lastly, the duty to “fulfil” denotes that parties must structure their governmental apparatus and perform functions with an aim to contributing to the greater enjoyment of rights.²⁰⁷ Therefore, governmental institutions and bodies, whether traditionally belonging to the executive, judicial, or legislative branches or specifically created for the promotion and protection of human rights, must contribute to the formulation of a national system to carry out these different categories of duties.²⁰⁸ An unrecognised entity is best placed to establish such a system in the territory over which it exercises control, as opposed to the parent State. Even though the territory in question might *de jure* belong to an existing State party to international human rights instruments, without *de facto* territorial control and the requisite governmental structures, the said State party would hardly be able to perform the latter two categories of duties, the duties to protect and to fulfil. In short, acknowledging the capacity of unrecognised entities to conclude or to participate in human rights agreements serves the purpose of securing the *full* protection of human rights in territories not controlled by other States.

The close link between effective territorial control and obligations under international human rights treaties can also be observed in international jurisprudence concerning the extraterritorial application of such treaties.²⁰⁹

This issue has been addressed by the ICJ in the *Israeli Wall Advisory*

²⁰⁶ *Velásquez-Rodríguez v Honduras* (Judgment) Inter-American Court of Human Rights Series C No 4 (29 July 1988) paras 172, 174-77.

²⁰⁷ Bertrand G. Ramcharan, *The Fundamentals of International Human Rights Treaty Law* (Martinus Nijhoff Publishers 2011) 133-34.

²⁰⁸ Jean-Bernard Marie, ‘National Systems for the Protection of Human Rights’ in Janusz Symonides (ed), *Human Rights: International Protection, Monitoring, Enforcement* (Ashgate 2004) 258.

²⁰⁹ In addition to cases concerning extraterritorial application of human rights treaties, the link can also be observed in *Azemi v Serbia* before the ECtHR. In this case, the applicant complained that the non-enforcement of a decision by a municipal court in Kosovo violated his right to a fair trial, and the Court decided that Serbia, due to its lack of control over Kosovo, “cannot be held responsible ... for the non-enforcement”. *Azemi v Serbia* App no 11209/09 (ECtHR, 5 November 2013) paras 45-49.

Opinion, the *Armed Activities on the Territory of the Congo Case*, and the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination Case*.²¹⁰ In the *Israeli Wall Advisory Opinion*, the ICJ analysed the extraterritorial applicability of the ICCPR, the ICESCR, and the CRC. Based on the work of the relevant treaty bodies, the ICJ noted Israel's "exercise of effective jurisdiction" in the Occupied Territories and its "territorial jurisdiction as the occupying Power" and opined that both Covenants were applicable to acts of Israel in the territories it occupied.²¹¹ A similar conclusion was drawn in relation to the CRC.²¹² In the *Armed Activities* case, the ICJ reaffirmed the position that a State, while performing acts as an occupying Power, bears obligations under international human rights treaties beyond its territory.²¹³ While the ICJ's provisional measures order in the third case mentioned above also acknowledged the extraterritorial applicability of the International Convention on the Elimination of All Forms of Racial Discrimination and "other provisions of instruments [without restrictions relating to their territorial application]" to a State's conduct outside its territory, the Court did not specify in this instance the factor of effective control over the territory.²¹⁴ The ICJ's decisions in these three cases only provided brief discussions of the rationale behind the extraterritorial application of international human rights treaties,²¹⁵ but at least in the first two cases, it

²¹⁰ The ICJ first discussed the issue of extraterritorial obligations under international human rights law in the *Namibia Advisory Opinion*. However, as it is not addressing the application of international human rights treaties, this opinion would not be discussed here.

²¹¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, paras 108-12.

²¹² *ibid* para 113.

²¹³ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 168, 216-17.

²¹⁴ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Request for the Indication of Provisional Measures: Order) General List No 140 [2008] ICJ Rep 353, para 109.

²¹⁵ Ralph Wilde, 'Human Rights beyond Borders at the World Court: The Significance of the International Court of Justice's Jurisprudence on the Extraterritorial Application of International Human Rights Treaties' (2013) 12 Chinese J Intl L 639, 673.

may be inferred that such application rests on the control that a State exerts over territories it occupies.²¹⁶

The ECtHR, on the other hand, has made a clearer association between territorial control and the extraterritorial application of the ECHR. In *Loizidou v Turkey*, the ECtHR held that:

[T]he responsibility of a Contracting Party may also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.²¹⁷

This view has been upheld in the ECtHR's subsequent decisions.²¹⁸ In these cases, the test of "effective control" has been used to determine the extraterritorial applicability of the ECHR.²¹⁹ As Milanovic observes, "the state's capacity either to violate or to protect human rights in a given territory does not depend on whether it possesses title or *de jure* sovereignty over it. ... It is only the state's actual *control* over the territory that matters."²²⁰ In order to ensure the enjoyment of human rights in territories controlled by a State that does not possess *de jure* sovereignty, it is necessary to acknowledge the extraterritorial applicability of international human rights treaties in those territories. This echoes the

²¹⁶ It is acknowledged that these cases concern the territorial control of *States* (rather than non-State entities) and their obligations under international human rights treaties.

²¹⁷ *Loizidou v Turkey* App no 15318/89 (Preliminary Objections) (ECtHR, 23 March 1995) para 62.

²¹⁸ Eg *Cyprus v Turkey* App no 25781/94 (ECtHR, 10 May 2001) para 77; *Banković et al v Belgium et al* App no 52207/99 (ECtHR, 12 December 2001) para 71.

²¹⁹ Damira Kamchibekova, 'State Responsibility for Extraterritorial Human Rights Violations' (2007) 13 *Buffalo Human Rights L Rev* 87, 146-47.

²²⁰ Milanovic (n 19) 106.

argument in relation to unrecognised entities and the territories they control, further demonstrating the necessity to acknowledge unrecognised entities' capacity to conclude or to participate in international human rights treaties.²²¹

2. The Necessity for the Continuity of International Human Rights Treaty Obligations

The principle of continuity of international human rights treaty obligations suggests that once an international human rights treaty enters into force for a State, the relevant rights of the individuals living in the territory of that State should continue to be protected, despite changes in the government or governing State.²²² This is necessary since it is the only way to ensure the continued enjoyment of the rights already accorded to the individuals in that State after the entry into force of the international human rights treaty in question. Furthermore, in order for the international human rights treaty obligations to continue, it is necessary that, in the case of State succession or changes of governing entity, the succeeding entity possesses the capacity to participate in international human rights treaties to which the former governing State is a party.

Those supporting continuity of obligations under international human rights treaties rely on the special characteristics and considerations of human rights treaties to justify their approach,²²³ including issues in relation to denunciation of and State succession with respect to international human rights treaties. The following discussion focuses on these two aspects to

²²¹ See Yael Ronen, 'Human Rights Obligations of Territorial Non-State Actors' (2013) 46 Cornell Intl LJ 21, 25-27.

²²² For an example of the usage of the term "principle of continuity" in the context of international human rights treaties, see Menno T Kamminga, 'State Succession in Respect of Human Rights Treaties' (1996) 7 EJIL 469.

²²³ UN Human Rights Committee, 'General Comment No. 26' in 'Compilation of General Comments' (n 203) 223, para 4.

examine if the principle of continuity of obligations applies and if it can justify the necessity of granting unrecognised entities treaty-making capacity in relation to international human rights treaties.

a. Denunciation of International Human Rights Treaties

Those advocating against the choice to opt out of international human rights treaties argue that such treaties usually do not contain withdrawal or termination clauses. Moreover, human rights treaties generally do not allow for the possibility of denunciation. These designs seem to suggest that once a State agrees to undertake the obligations under an international human rights treaty, it is not permitted to opt out of the treaty and the protection of human rights in its territory must be continued. However, this argument is questionable. While the ICCPR, the ICESCR, the CEDAW, and the International Convention for the Protection of All Persons from Enforced Disappearance do not contain denunciation clauses, other international human rights treaties do.²²⁴

To understand whether those treaties without denunciation clauses in fact permit denunciation, an examination of the practice of the Human Rights Committee and States parties in relation to the ICCPR can be of value. The issue of denunciation with regards to the ICCPR first emerged when the Netherlands considered denouncing the Covenant after the Human Rights Committee issued its opinion on Dutch social security laws.²²⁵ In

²²⁴ For examples of provisions on denunciation (by written notification): International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195, art 2; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, art 31; Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, art 52; International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3, art 89(1); Convention on the Rights of Persons with Disabilities (n 12) art 48.

²²⁵ 'Human Rights News' (1988) 6 Netherlands Q Human Rights 91, 94-95. The opinion in question is *S W M Broeks v Netherlands*, Communications No 172/1984 (9 April 1987) UN Doc CCPR/C/29/D/172/1984.

response, a petition initiated by the Dutch section of the International Commission of Jurists expressed the opinion of a number of prominent scholars that denunciation of the ICCPR was impermissible.²²⁶ Firstly, as Article 56 of the 1969 Vienna Convention provides conditions allowing for denunciation and withdrawal, such conditions do not apply in the case of the Covenant. The conditions are: "a. It is established that the parties intended to admit the possibility of denunciation or withdrawal"; or b. a right of denunciation or withdrawal may be implied by the nature of the treaty."²²⁷ Furthermore, the fact that the ICCPR includes a provision for denunciation regarding the inter-State communications procedure demonstrates that the drafters were conscious of the issue of denunciation but intentionally chose not to provide for a right of withdrawal from the substantive obligations of the ICCPR.

In 1997, the Democratic People's Republic of Korea (DPRK) attempted to denounce the ICCPR, in an action taken to protest a resolution adopted by the Sub-Commission on Prevention of Discrimination and Protection of Minorities.²²⁸ The DPRK officially submitted a notification of withdrawal to the UN Secretary-General and issued a statement noting that its status as a State party to the ICCPR had been abused by other States with the adoption of the resolution. In response to the denunciation, the UN Secretary-General, as the depository of the ICCPR, and the Human Rights Committee, the monitoring body of the ICCPR, appeared to hold different opinions regarding its effect. The former applied Article 54 of the 1969 Vienna Convention and opined that, absent a specific denunciation clause in the ICCPR, the DRPK's withdrawal from the ICCPR would only be

²²⁶ 'Petition Submitted to the Dutch Minister of Foreign Affairs, in Connection with the International Covenant on Civil and Political Rights' (1988) 6 Netherlands Q Human Rights 128, 129-30.

²²⁷ Vienna Convention on the Law of Treaties (n 5) art 56(1).

²²⁸ UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities Res 1997/3 (21 August 1997) UN Doc E/CN.4/Sub.2/1997/50, 18-19.

possible if all States parties agreed with such a withdrawal.²²⁹ The Human Rights Committee, however, adopted General Comment No 26, taking the view that denunciation of the ICCPR was impermissible.²³⁰ In addition to the arguments put forward by the Dutch jurists mentioned above, the Human Rights Committee emphasised that the ICCPR “the Covenant does not have a temporary character”, a common characteristic shared by treaties with a right of denunciation.²³¹ Also, the Committee reiterated its position that once the ICCPR entered into force in the territory of a State party, the rights accorded to the people belong to them. Eventually, the DPRK did submit its second periodic report on the implementation of the ICCPR to the Human Rights Committee,²³² an undertaking provided in Article 40 of the ICCPR that all States parties must oblige. It is worth noting that while the DPRK is still considered as a State party to the ICCPR,²³³ in the DPRK’s national report for the Universal Periodic Review of the Human Rights Council, the ICCPR was not included as one of the instruments to which the DPRK had acceded.²³⁴ This would suggest that the DPRK does not consider itself a party to the ICCPR.

Despite the opinion voiced by the Human Rights Committee, it is in fact difficult to unequivocally conclude that human rights treaties have a special status in terms of the rules regarding denunciation.²³⁵ As a large number

²²⁹ UNTC, ‘Status of the International Covenant on Civil and Political Rights’, 75 n 8 <<http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-4.en.pdf>> accessed 20 August 2014.

²³⁰ UN Human Rights Committee, ‘General Comment No. 26’ (n 223) 222-23.

²³¹ *ibid* para 3.

²³² Second Periodic Report of the Democratic People’s Republic of Korea on Its Implementation of the International Covenant on Civil and Political Rights (4 May 2000) UN Doc CCPR/C/PRK/2000/2.

²³³ See UNTC, ‘Chapter IV Human Rights: 4. International Covenant on Civil and Political Rights’ <http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en> accessed 20 August 2014; ‘Compilation Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(b) of the Annex to Human Rights Council Resolution 5/1: Democratic People’s Republic of Korea’ (18 September 2009) UN Doc A/HRC/WG.6/6/PRK/2, 2.

²³⁴ ‘National Report: Democratic People’s Republic of Korea’ (27 August 2009) UN Doc A/HRC/WG.6/6/PRK/1, para 27.

²³⁵ Yogesh Tyagi, ‘The Denunciation of Human Rights Treaties’ (2008) 79 *British YB Intl L* 86,

of international treaties contain denunciation clauses, in order to achieve wider participation, many human rights treaties embrace the same approach. Practice of denunciation of human rights treaties can also be observed at the regional level, with Trinidad and Tobago denouncing the American Convention on Human Rights in 1998, and Venezuela in 2012.²³⁶ In other words, States parties, especially those to treaties with denunciation clauses, appear to enjoy the discretion of discontinuing their obligations under human rights treaties. Therefore, the argument that human rights treaties in general are of the nature that forbids denunciation seems invalid and thus cannot be used to support the principle of continuity of international human rights treaty obligations.

b. State Succession in Respect of International Human Rights Treaties

In situations involving State succession in respect of treaties, a “clean slate” approach is often proposed,²³⁷ although it has been argued that the approach should be subject to limitations in order to be “reconciled with the existence of external legal obligation”.²³⁸ For instance, the “clean slate” approach should not be applied to cases of treaties establishing boundaries and other territorial regimes.²³⁹ Some hold the view that such an approach should also be suspended in the case of human rights treaties,

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²³⁶ Organization of American States, Department of International Law, 'Multilateral Treaties: American Convention on Human Rights' <http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm> accessed 20 August 2014.

²³⁷ The term originated from the following passage by McNair:

[N]ewly established States which do not result from a political dismemberment and cannot fairly be said to involve political continuity with any predecessor, start with a clean slate ... except as regards the purely local or “real” obligations of the State formerly exercising sovereignty over the territory of the new State.

McNair (n 35) 601.

²³⁸ Matthew CR Craven, 'The Problem of State Succession and the Identity of States under International Law' (1998) 9 EJIL 142, 149.

²³⁹ Eg Vienna Convention on Succession of States in Respect of Treaties (adopted 23 August 1978, entered into force 6 November 1996) 1946 UNTS 3, arts 11, 12.

and that successor States should automatically assume obligations under such treaties.²⁴⁰ This view is based on the considerations that changes in the governing State should not deprive the population living in those territories of the rights already conferred upon them. In other words, when the predecessor State adheres to a human rights treaty, the rights of individuals subject to the jurisdiction of that State are then safeguarded by that treaty. The individuals should continue to enjoy those rights despite changes in government, or in the case of State succession, in governing States. Also, it has been argued that the continuity of obligations under international human rights treaties relates to the object and purpose of these treaties. When commenting on the succession of obligations under the Genocide Convention, Judge Shahabuddeen wrote that the object and purpose of the Convention demanded that parties avoid gaps in the protection afforded by it.²⁴¹ Furthermore, in order to give effect to the object and purpose of the Convention, it must be construed that parties of the Convention undertake to “treat successor States as continuing as from independence any status which the predecessor State had as a party to the Convention”.²⁴² Commenting in the same case, Judge Weeramantry opined that denying automatic succession of human rights treaties would result in an undesirable legal vacuum, and the undesirability “becomes more evident still if the human rights treaty under consideration is one as fundamental as the Genocide Convention”.²⁴³

In the aftermath of the disintegration of the Union of Soviet Socialist Republics (USSR), the Socialist Federal Republic of Yugoslavia (SFRY), and

²⁴⁰ Eg UN Human Rights Committee, ‘General Comment No. 26’ (n 223); UNCHR Res 1994/16 (25 February 1994) UN Doc E/CN.4/RES/1994/16. See also Rein Mullerson, ‘New Developments in the Former USSR and Yugoslavia’ (1993) 33 Virginia J Intl L 299, 318-21.

²⁴¹ *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v Yugoslavia)* [1996] ICJ Rep 595, 635 (Separate opinion of Judge Shahabuddeen).

²⁴² *ibid* 636.

²⁴³ *ibid* 649-50 (Separate opinion of Judge Weeramantry).

the Czech and Slovak Federal Republic (CSFR) in the 1990s, questions arose regarding whether the successor States automatically succeeded to the international human rights treaties to which their predecessors were parties. Various European and UN human rights institutions took measures that reflected their opinions on this issue. At the European level, after the dissolution of the CSFR on 1 January 1993, the two resulting republics were admitted as members of the Council of Europe, a precondition for becoming parties to the ECHR. Although the membership admissions took place six months after the republics declared independence, the Council of Europe decided that the two States should be considered as succeeding to the ECHR from the date of independence, 1 January 1993.²⁴⁴ Also, as there is no record of any notification or declaration by either the Czech Republic or Slovakia, it can be assumed that the succession of treaty obligations occurred automatically.²⁴⁵

At the UN level, the Commission on Human Rights (the predecessor of the Human Rights Council), although not explicitly supporting the notion of automatic succession for international human rights treaties, repeatedly called on successor States “to confirm to appropriate depositaries that they continue to be bound by obligations under relevant international human rights treaties”.²⁴⁶ Similar language is also seen in the Committee on Elimination of Racial Discrimination’s General Recommendation No 12.²⁴⁷ Some take the position that these calls for action imply that the successor States could decide whether they wanted to adhere to the human rights

²⁴⁴ Council of Europe, Directorate of Human Rights, Information Sheet No 32 (January-June 1993) Doc H/INF(94) 1.

²⁴⁵ Menno T Kamminga, ‘Impact on State Succession in Respect of Treaties’ in Kamminga and Scheinin (eds) (n 32) 103.

²⁴⁶ UNCHR Res 16 (1994) (n 240).

²⁴⁷ UN Committee on Elimination of Racial Discrimination, ‘General Recommendation No. 12’ in ‘Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies’ (27 May 2008) UN Doc HRI/GEN/1/Rev.9 (Vol. II), 276.

treaties that their predecessors committed to,²⁴⁸ and the confirmation notes from successor States are thus considered to have a constitutive effect on the continuation of treaty obligations.²⁴⁹ Nevertheless, it can also be argued that the use of term “confirm” suggests the continuation of obligations under those treaties is automatic and the act of confirmation merely reinforces the commitment of the successor States. Supporting this interpretation, Kamminga has referred to the example of the call by the UN General Assembly in 1977²⁵⁰ to Member States to make declarations against torture and other cruel, inhuman or degrading treatment or punishment and expressing their intention to comply with a relevant UN declaration.²⁵¹ Kamminga argues that the declarations issued in this context have been deemed as “reinforcing” the prohibition against torture, rather than having a constitutive effect.²⁵² It has also been pointed out that the Commission on Human Rights referred to and emphasised the “special nature” of human rights treaties and that it requested relevant treaty bodies to consider the “continuing applicability of the respective international human rights treaties to successor States”.²⁵³ Such language further upholds the view that the Commission of Human Rights believed the applicability of an international human rights treaty should continue despite the change in governing State.

Furthermore, the support of the UN human rights treaty bodies for automatic succession has been more explicitly expressed. In 1994, the chairpersons of the human rights treaty bodies took the view that “successor States are automatically bound by obligations under

²⁴⁸ Johannes Chan, ‘State Succession to Human Rights Treaties: Hong Kong and the International Covenant on Civil and Political Rights’ (1996) 45 ICLQ 928, 935.

²⁴⁹ Akbar Rasulov, ‘Revisiting State Succession to Humanitarian Treaties: Is There a Case for Automaticity’ (2003) 14 EJIL 141, 157.

²⁵⁰ Kamminga, ‘Impact on State Succession in Respect of Treaties’ (n 245) 108.

²⁵¹ UNGA Res 32/64 (8 December 1977) UN Doc A/RES/32/64.

²⁵² Kamminga, ‘Impact on State Succession in Respect of Treaties’ (n 245) 108.

²⁵³ UNCHR Res 16 (1994) (n 240) paras 2-3.

international human rights instruments from their respective date of independence and that the respect of their obligations should not depend on a declaration of confirmation made by the new Government of the successor State".²⁵⁴ In General Comment No 26, adopted by the Human Rights Committee in 1998, it is stated that "once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession".²⁵⁵ It has been argued that the Committee's position in this regard was later followed by the ECtHR in *Bijelic v Montenegro and Serbia*,²⁵⁶ where the Court held that: "given ... the principle that fundamental rights protected by international human rights treaties should indeed belong to individuals living in the territory of the State party concerned, notwithstanding its subsequent dissolution or succession".²⁵⁷ In 2004, the Human Rights Committee, when preparing the list of ratifications of the ICCPR, noted that in the case of Kazakhstan (a successor State of the USSR), although it had not submitted a "declaration of succession", "the people within the territory of the State – which constituted part of a former State party to the Covenant – continue to be entitled to the guarantees enunciated in the Covenant".²⁵⁸ Finally, for those successor States that have submitted declarations of confirmation some time after independence, there has been no objection to the Committee's position that the Covenant took effect at the time of

²⁵⁴ 'Report of the Fifth Meeting of Persons Chairing the Human Rights Treaty Bodies' (19 October 1994) UN Doc A/49/537, para 32.

²⁵⁵ UN Human Rights Committee, 'General Comment No. 26' (n 223) para 4.

²⁵⁶ Anthony Cullen and Steven Wheatley, 'The Human Rights of Individuals in *De Facto* Regimes under the European Convention on Human Rights' (2013) 13 Human Rights L Rev 691, 720.

²⁵⁷ *Bijelic v Montenegro and Serbia* App no 11890/05 (ECtHR, 28 April 2009) para 69.

²⁵⁸ UN Human Rights Committee, 'Report of the Human Rights Committee' (1 October 2004) UN Doc A/59/40 (Vol. I), 172.

independence, rather than three months after the issuance of their “instruments of accession”, as required by Article 49(2) of the ICCPR.

However, some have pointed to the practice of the Committee on Economic, Social and Cultural Rights (CESCR) regarding Hong Kong and have suggested that it did not consider succession of treaty obligations under ICESCR was automatic.²⁵⁹ It has been noted that in the CESCR’s concluding observations on the United Kingdom’s last report on Hong Kong, the Committee “hope[d] that the People’s Republic of China [would] accede to the Covenant”.²⁶⁰ In addition, the fact that the CESCR urged the United Kingdom to “inform the Committee as soon as possible of the modalities” agreed by it and China to continue the reporting obligations under the Covenant after 1997²⁶¹ was interpreted to suggest that succession is not automatic.²⁶² This research disagrees with such an interpretation. At the time when sovereignty over Hong Kong was transferred back to China, China was not a party to the ICESCR,²⁶³ and even if the theory of automatic succession is applied, the Covenant would not take effect in the whole of China’s territory. Therefore, inviting China to accede to the Covenant and thus making the Covenant applicable to the rest of China should not be equated as rejecting the notion of automatic succession. Likewise, the CESCR’s request for information regarding agreed reporting modalities after 1997 cannot serve as evidence against automatic succession. The fact that it asked for the agreed modalities did not mean that the Committee believed the reporting obligation itself was

²⁵⁹ Chan (n 248) 936.

²⁶⁰ UN Committee on Economic, Social and Cultural Rights, ‘Concluding Observations of the Committee on Economic, Social and Cultural Rights: United Kingdom of Great Britain and Northern Ireland’ (21 December 1994) UN Doc E/C.12/1994/19, para 20.

²⁶¹ *ibid* para 32.

²⁶² Chan (n 248) 936.

²⁶³ China became a party to the ICESCR on 27 March 2001. UN OHCHR, ‘View the Ratification Status by Country: China’ <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=36&Lang=EN> accessed 20 August 2014.

subject to the agreement of the two States. Since China was not a party to the Covenant and since the next reporting period would cover both British and Chinese rule of the territory, it was natural that the Committee urged the two States to discuss the details regarding the preparation and presentation of the report on the implementation of the ICESCR during this period.

In sum, although some take the view that automatic succession with regards to international human rights treaties has not been accepted as a rule of customary international law and is still subject to debate,²⁶⁴ the practice of international and European institutions illustrated above provide strong support to the notion of automatic succession. It can also be observed that successor States have not challenged or objected to the view expressed by these institutions.

Applying the rationale behind automatic succession of international human rights treaties to cases of unrecognised entities, even though such entities do not necessarily qualify as “successor States”, the continuity of obligations under international human rights treaties should remain since the rationale behind automatic succession of international human rights treaties rests on the features of international human rights treaties, rather than the nature or qualifications of the succeeding entity. This position finds support in the practice of the Human Rights Committee with regard to Kosovo. After considering the report submitted by UNMIK on the implementation of the ICCPR, the Committee in its concluding observation explicitly stipulated that “UNMIK, as well as [the Provisional Institutions of

²⁶⁴ Kamminga, ‘Impact on State Succession in Respect of Treaties’ (n 245) 109. See also Matthew Craven, *The Decolonization of International Law: State Succession and the Law of Treaties* (OUP 2007) 252 (stating that some commentators considered automatic succession with respect of human rights treaties “an emergent principle” and is often “expressed in guarded or hesitant form”).

Self-Government], or any future administration in Kosovo, are bound to respect and to ensure to all individuals within the territory of Kosovo and subject to their jurisdiction the rights recognized in the Covenant".²⁶⁵ Therefore, an unrecognised entity should assume the obligations under the human rights treaties undertaken by the State that formerly exercised effective control of the territory in question, thus guaranteeing the enjoyment of rights already acquired by the people living in that territory.

3. The Necessity to Grant Treaty-Making Capacity to International Legal Persons

It remains true that only States have international legal personality to the fullest extent,²⁶⁶ but under modern international law, it can be argued that statehood is not an essential condition for the possession of international legal personality.²⁶⁷ Different theories of international legal personality have been proposed. On the one hand, the traditionalists emphasise the primacy of the State and consider States as "repositories of legitimated authority over peoples and territories".²⁶⁸ According to this school of thought, the legal personality of non-State entities must derive directly or indirectly from States, and the former's possession of international rights and duties is based on a transfer of authority from States.²⁶⁹ Another school takes a realist approach and stresses the decline of the State and the rise of non-State entities. It embraces the changes brought by the drastic growth of non-State actors, such as international and regional organisations, corporations, sub-national governments, etc, and considers

²⁶⁵ UN Human Rights Committee, 'Concluding Observations: Kosovo (Serbia)' (n 168) para 4.

²⁶⁶ Anthony Aust, *Handbook of International Law* (CUP 2005) 16.

²⁶⁷ Philip C Jessup, 'The Subjects of a Modern Law of Nations' (1947) 45 Michigan L Rev 383, 389.

²⁶⁸ Wolfgang Fiedmann, *The Changing Structure of International Law* (Stevens & Sons 1964 Ltd) 213.

²⁶⁹ James E Hickey, Jr, 'The Source of International Legal Personality in the 21st Century' (1997) 2 Hofstra L & Pol'y Symp 1, 12-14.

any entity that “factually establishes an ability to influence and shape the content and application of international law” has international legal personality, albeit without States’ consent.²⁷⁰ These two approaches represent the opposite ends of the spectrum, with the former being too strict to reflect the emergence of non-State actors and their increasing importance and the latter too accommodating to the new actors without sufficiently justifying why their mere factual existence and influence warrant the status of international legal persons.

Neither of the two theories introduced above provides satisfactory justification for the criteria of determining whether an entity possess international legal personality. Although a consensus has not been formed in this respect, one crucial characteristic common to all subjects of international law is the composition of organs that are “not subject to the jurisdiction of any one other organized community”.²⁷¹ This is also demonstrated by the existence of a separate will,²⁷² which can be presumed if an entity possesses permanency and distinct purposes, powers, and organs.²⁷³ While the two theories described above present opposite ends of the spectrum, this approach stands in between. It differs from the first theory in that it no longer insists that international legal personality must derive from the will of States. The element of exclusivity, that the entity must not be subject to the control of any other international legal persons, distinguishes this approach from the second theory and may justify why such entities deserve distinct personality.

²⁷⁰ *ibid* 14-15.

²⁷¹ Seyersted, ‘Objective International Personality of Intergovernmental Organizations?’ (n 114) 48.

²⁷² Fergus Green, ‘Fragmentation in Two Dimensions: The ICJ’s Flawed Approach to Non-State Actors and International Legal Personality’ (2008) 9 *Melbourne J Intl L* 47, 55.

²⁷³ Nigel D White, *The Law of International Organisations* (2nd edn, Manchester UP 2005) 30-32.

Unrecognised entities, due to the fact that they exercise effective control of territory with established governmental structures independent of control from other States, arguably possess a certain degree of international legal personality. According to the definition elaborated in the previous chapter, one essential criterion of unrecognised entities is *de facto* independence. Thus, the conduct and decisions of unrecognised entities are not that of a third State, and they are not subject to substantial foreign control or domination on a permanent basis. These features correspond to the common characteristic of international legal persons mentioned above.

However, even if the possession of international legal personality of an unrecognised entity can be established, it does not necessarily follow that it has treaty-making capacity. The precise relationship between legal personality, on the one hand, and the capacity to perform certain acts and to possess rights and duties, on the other hand, is subject to debate. The possession of legal personality has been considered by many as the threshold for an entity in a legal system to perform legal acts.²⁷⁴ In contrast, a second school considers that if an entity has rights and duties, it has legal personality.²⁷⁵ In other words, the performance of legal acts by the entity in question could serve as evidence of its legal personality.

With regards to treaty-making capacity, some scholarly writings even suggest that there is no necessary nexus between the notion of international personality and treaty-making capacity.²⁷⁶ Yet, it has also been argued that treaty-making capacity is among the core capacities that

²⁷⁴ Jan Klabbbers, 'The Concept of Legal Personality' (2005) 11 *Ius Gentium* 35, 49-56.

²⁷⁵ MNS Sellers, 'International Legal Personality' (2005) 11 *Ius Gentium* 67, 74; Claudia Kissling, 'The Legal Status of NGOs in International Governance and Its Relevance for the Legitimacy of International Organizations' (2006) University of Bremen TranState Working Paper No 38, 7-8 <<http://econstor.eu/bitstream/10419/24951/1/514650192.PDF>> accessed 20 August 2014.

²⁷⁶ Chiu, *The Capacity of International Organizations* (n 20) 29; Hartmann (n 113) 140.

are inherent in an international legal person.²⁷⁷ While views on this issue remain divergent, it has been generally agreed that not all international legal persons possess the same capacities.²⁷⁸ Therefore, even if the first school of thought, which asserts that the possession of legal personality leads to legal capacity, is adopted, it does not necessarily justify the argument that unrecognised entities have the capacity to conclude or to participate in international human rights treaties.

The notion of necessity arguably provides a valid basis for granting unrecognised entities treaty-making capacity in relation to international human rights treaties. The principle of continuity of international human rights treaty obligations further affirms the necessity of allowing participation of unrecognised entities. However, the concept of international legal personality cannot be proven as sufficient to support according treaty-making capacity to unrecognised entities. It is only through analysing the nature of the entity in question and the necessity of granting it capacities to act on the international plane can one determine the extent of the entity's international rights, obligations, and legal capacity.

B. Reasons behind the Reluctance of States to Acknowledge the Capacity of Unrecognised Entities to Conclude or Participate in International Human Rights Treaties

While acknowledging the capacity of unrecognised entities to conclude or to participate in international human rights treaties responds to the needs of the international community, concerns that might discourage such acknowledgement are evident also. The discussion below proposes four

²⁷⁷ White (n 273) 34; C F Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd edn, CUP 2005) 98.

²⁷⁸ O'Connell, *International Law* (n 198) 82.

possible arguments against acknowledging the treaty-making capacity of unrecognised entities in relation to international human rights treaties and examines whether they are valid in light of international practice.

1. Risk of Improperly Legitimising Certain Entities

Acknowledging the capacity of unrecognised entities to bear international legal obligations can be interpreted as according legitimacy to those entities.²⁷⁹ Providing non-State entities with the opportunity to participate in multilateral treaties has been interpreted as allowing them to “enhance their status”.²⁸⁰ This concern is exacerbated when the entity in question is established through means contrary to international law. A similar argument has been raised in relation to applying rules of international humanitarian law to regulate the conduct of non-State armed groups.²⁸¹ This concern is somehow mitigated by the inclusion of certain provisions in international humanitarian law instruments (for instance, Common Article 3 of the Geneva Conventions and Article 4 of Additional Protocol I to the Geneva Conventions) stipulating that the application of those rules does not affect the legal status of parties to the conflict, including non-State armed group.²⁸² In addition, it has been argued that the imposition of international obligations on non-State armed groups serves to limit their conduct of warfare and does not in any way legitimise the use of violence by such groups or endorse their political aims.²⁸³

²⁷⁹ This was suggested by Clapham as a possible argument against imposing international obligations to non-State actors, but he later refuted the argument and concluded that little empirical evidence reflected the concern of legitimisation. Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006) 46-53.

²⁸⁰ Summary Records of the Second Session of the UN Conference on the Law of Treaties (n 40) 234 (Statement of Groepper (Federal Republic of Germany) at the 88th meeting of the Committee of the Whole).

²⁸¹ Roberts and Sivakumaran (n 154) 134-36 (ultimately concluding that even if the risk of legitimisation exists, it is insufficient to bar non-State armed groups from participating in the law-making process of international humanitarian law.).

²⁸² Clapham, *Human Rights Obligations* (n 279) 51.

²⁸³ *ibid* 52.

While there has been a longstanding concern that acknowledging the treaty-making capacity of unrecognised entities implies legitimising the entities established through unlawful means, international practice suggests that such a concern has not barred other States from concluding treaties and agreements with unrecognised entities.²⁸⁴ Modern practice has even seen the conclusion of agreements between unrecognised entities and their “parent States”: for instance, the Economic Cooperation Framework Agreement between two sides of the Taiwan Strait²⁸⁵ and agreements between Serbia and Kosovo on issues including population registry, freedom of movement, and acceptance of university and school diplomas.²⁸⁶ This goes to show that the need for cooperation, interaction, and establishment of treaty relations has outweighed the concern of improperly legitimising unrecognised entities.

2. Implied Recognition

Traditionally, conclusion of bilateral treaties represented a strong indication of implied recognition.²⁸⁷ However, while establishing treaty relations with an unrecognised entity unavoidably acknowledges its *de facto* status, contemporary practice suggests that establishing treaty relations with an unrecognised entity does not necessarily indicate a change of attitude in terms of recognition.²⁸⁸ For instance, after the Second World War, the German Democratic Republic entered into many short- and long-term

²⁸⁴ For instance, the Republic of China (Taiwan) concludes many official, semi-official and unofficial agreements with other States or entities, and the list of agreements and selected texts for each year are reproduced in the Chinese (Taiwan) Yearbook of International Law and Affairs.

²⁸⁵ Cross-Straits Economic Cooperation Framework Agreement (29 June 2010) <<http://www.ecfa.org.tw/EcfaAttachment/ECFADoc/ECFA.pdf>> accessed 20 August 2014.

²⁸⁶ Dialogue Agreement on Civil Registry Books (Serbia–Kosovo) (2 July 2011); Dialogue Agreement on Freedom of Movement (Serbia–Kosovo) (2 July 2011); Dialogue Agreement on Acceptance of University Diplomas (Serbia–Kosovo) (2 July 2011); European Union, ‘EU Facilitated Dialogue: Three Agreements’ (2 July 2011) Press Statement 12410/11 <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/123383.pdf> accessed 20 August 2014.

²⁸⁷ Lauterpacht, *Recognition* (n 173) 375.

²⁸⁸ B R Bot, *Non-Recognition and Treaty Relations* (A W Sijthoff 1968) 67-68.

treaties with States that refused to recognise it, including the United Arab Republic, a union between Egypt and Syria.²⁸⁹ Additionally, Egypt maintained treaty relations with North Korea and the PRC prior to recognising them.²⁹⁰ It follows that non-recognition does not mean the absence of any form of interaction. Establishing treaty relations and granting State recognition differ in scope and purpose. Acknowledging the capacity of an unrecognised entity to act at the international level through the conclusion of a treaty on a particular subject matter should not be equated with recognising that the entity in question possesses all the qualifications of statehood and the rights and obligations resulting therefrom.²⁹¹

In terms of multilateral treaties, allowing unrecognised entities to participate in such treaties that are originally open to States might be construed as some form of recognition of statehood. In this respect, it has been proposed that if the statehood of an entity is recognised by some, but not all, existing States parties of an international treaty, such an entity may still be allowed to become a party provided that the treaty remains inoperative between that entity and the non-recognising States.²⁹² In other words, the fact that an unrecognised entity and non-recognising State become parties to the same international legal instrument does not in and of itself lead to the conclusion that a change of attitude with regards to recognition can be implied.

3. Lack of Ability to Protect and Fulfil Human Rights

²⁸⁹ *ibid* 77.

²⁹⁰ *ibid*.

²⁹¹ Lauterpacht, *Recognition* (n 173) 375.

²⁹² *ibid* 371-72.

As previously mentioned, international human rights treaties have often been interpreted as designating the manner in which the obligations contained therein should be discharged, and in order to respect, protect and fulfil human rights provided in those instruments, a national system of protection is required. Thus, there might be doubts as to whether unrecognised entities have the ability to comply with obligations under international human rights treaties, particularly considering that such treaties often call for the establishment of a national system to ensure enjoyment of human rights. Here, it is useful to recall that, when defining the notion of “unrecognised entities”, this thesis adopts criteria that locate the entities as, albeit not recognised as States, those that display State-like characteristics, which imply the ability to implement human rights protection through their infrastructure. In other words, by requiring that unrecognised entities must fulfil the Montevideo criteria and achieve *de facto* independence, it can be assumed that unrecognised entities have the governmental institutions in place to carry out all three categories of duties. In this regard, the element of “government” is of particular importance as it requires the exercise of “all the functions of a sovereign government in maintaining law and order, instituting and maintaining courts of justice, adopting or imposing laws regulating the relations of the inhabitants of the territory to one another and to the government”.²⁹³ These functions contribute to restraining the abuse of governmental powers and authorities, preventing human rights violations by private actors, and actively enhancing the enjoyment of rights by the population within the territory of the entity.

4. Danger of Downgrading Standards of Protection

²⁹³ *Government of Republic of Spain v SS Arantzazu Mendi and others* [1939] AC 256 (HL) 264-65.

In the field of international humanitarian law concerns have been raised that allowing armed groups to have the capacity to conclude agreements risks downgrading standards of protection.²⁹⁴ Similar concerns might arise in the field of human rights, especially in cases of bilateral agreements incorporating human rights elements. However, such concerns do not seem to correspond to existing practice. When parties to bilateral agreements include protection of human rights as a part of their obligations, references are often made to international human rights law in general, rather than to a selection of rights or to proposed standards different from those in the existing international human rights instruments. For instance, the 1990 San José Agreement concluded between El Salvador and the *Frente Farabundo Martí para la Liberación Nacional* (FMLN) requires respect for and guarantee of human rights recognized in “treaties to which El Salvador is a party” and “declarations and principles on human rights and humanitarian law adopted by the United Nations and the Organization of American States”.²⁹⁵ In the Comprehensive Agreement on Human Rights concluded by the government of Guatemala and the Guatemalan National Revolutionary Union (URNG) in 1994, although more detailed provisions were agreed, references are made to international instruments.²⁹⁶ In particular, the Agreement provides that:

For purposes of implementation of the general commitment regarding human rights (chapter I of the present agreement), the Parties understand human rights as meaning those rights which are recognized in the Guatemalan legal order including

²⁹⁴ Roberts and Sivakumaran (n 154) 137-38.

²⁹⁵ Agreement on Human Rights between the Government of El Salvador and the Frente Farabundo Martí para la Liberación Nacional (26 July 1990) UN Doc A/44/971-S/21541, Annex.

²⁹⁶ Comprehensive Agreement on Human Rights between the Government of Guatemala and the Guatemalan National Revolutionary Union (29 March 1994) 36 ILM 276, preamble (translation reprinted in Robert E Lutz, ‘A Piece of the Peace: The Human Rights Accord and the Guatemalan Peace Process’ (1995) 2 Southwestern JL & Trade Am 183, 193-201.)

international treaties, conventions and other instruments on the subject to which Guatemala is a party.²⁹⁷

In other words, parties to bilateral human rights agreements seldom lay down specific standards of protection, thus minimising the concern of downgrading standards of human rights protection.

To conclude, these four arguments seem insufficient to prevent acknowledging the treaty-making capacity of unrecognised entities in relation to international human rights treaties. While these concerns appear plausible in theory, they find little support in practice. Even if States remain cautious of the implications of allowing unrecognised entities to conclude or participate in international human rights treaties, such caution should not directly result in the denial of human rights treaty-making capacity to unrecognised entities. Instead, this issue may be addressed by adopting different means for unrecognised entities to express consent to be bound by human rights treaties.

IV. Means for Unrecognised Entities to Express Consent to be Bound by Human Rights Treaties

It may be possible for unrecognised entities to enter into bilateral treaties with States that do not share the concern of improper legitimisation and implied recognition mentioned above. Yet, participation in multilateral human rights treaties may not be as easy since existing States parties may disapprove of opening participation to unrecognised entities. The following discussion explores the different means for unrecognised entities to express consent.

²⁹⁷ *ibid* Ch X, para 15.

A. Conclusion of Bilateral Human Rights Treaties or Bilateral Treaties with Human Rights Components

While international human rights treaties are primarily multilateral in nature, certain human rights components can also be observed in bilateral treaties, especially in agreements concluded in the context of peace processes and instruments concluded for the purpose of providing humanitarian assistance.²⁹⁸ Practice of unrecognised entities in relation to bilateral treaties with human rights components is introduced below.

In relation to agreements with human rights components concluded in peace processes, examples can be found from El Salvador and Guatemala.²⁹⁹ In El Salvador, around 1980, the FMLN engaged in a large-scale non-international armed conflict with the government of El Salvador and at one point arguably fulfilled many criteria of statehood.³⁰⁰ The two sides of the conflict eventually began a peace dialogue in 1989, under the auspices of the UN, and the San José Agreement on Human Rights was signed on 26 July 1990.³⁰¹ The Preamble of the Agreement notes that the FMLN “has the capacity and the will and assumes the commitment to respect the inherent attributes of the human person”.³⁰² In Guatemala, by the mid-20th century, military rule rose to power and various guerrilla groups began actively fighting against the government, and among them was the URNG.³⁰³ The peace process, which began after the end of the Cold War, led to the conclusion of Comprehensive Human Rights Accord.³⁰⁴ The Accord expressly documented that the URNG had taken on “a

²⁹⁸ Schoiswohl (n 199) 228-35.

²⁹⁹ *ibid* 221.

³⁰⁰ Pegg (n 1) 34.

³⁰¹ Agreement on Human Rights between the Government of El Salvador and the Frente Farabundo Martí para la Liberación Nacional (n 295). See Schoiswohl (n 199) 229.

³⁰² Agreement on Human Rights between the Government of El Salvador and the Frente Farabundo Martí para la Liberación Nacional (n 295) preamble.

³⁰³ Schoiswohl (n 199) 231.

³⁰⁴ Lutz (n 296) 183.

commitment to respect the attributes inherent to human beings and to contribute to the effective enjoyment of Human Rights”, and also obliged the government of Guatemala to reaffirm its adherence to human rights norms.³⁰⁵

Both the FMLN and the URNG at one point fulfilled the criteria of unrecognised entities provided by this thesis,³⁰⁶ and these agreements are generally deemed as international instruments imposing binding legal obligations upon parties, and the conclusion of bilateral agreements can thus be considered a method for unrecognised entities to express consent to be bound by international human rights treaties. While the examples provided here show the conclusion of bilateral human rights treaties between unrecognised entities and their parent States, it appears that there is no reason to bar unrecognised entities from concluding such treaties with other actors who possess treaty-making capacity.

B. Official Participation in Multilateral Human Rights Treaties with the Consent of Existing State Parties

As existing international human rights treaties are only open for participation by States and, in the case of some treaties by international organisations,³⁰⁷ allowing unrecognised entities to officially participate as parties can only be achieved through treaty amendments. A survey of the provisions on amendment in UN human rights treaties reveals strict

³⁰⁵ Comprehensive Agreement on Human Rights between the Government of Guatemala and the Guatemalan National Revolutionary Union (n 296).

³⁰⁶ For discussions on the status of these groups and situations during the periods in which these agreements were concluded, see Pegg (n 1) 34; Schoiswohl (n 199) 228-33. For instance, Schoiswohl uses the FMLN and the URNG as examples of “*de facto* regimes”. Although the author does not provide a definition of “*de facto* regimes”, his description of such regimes closely resembles the notion of “unrecognized entities” as defined by this thesis. See *ibid* 206-14. For instance, he states: “[w]hat in any event remains essential for an entity to be qualified as a *de facto* regime is that it exercises effective authority over a territory without being recognized as an independent State or government of an already existing State.” *ibid* 208.

³⁰⁷ See text accompanying n 12-16.

procedural rules as well as the requirement of approval by the UN General Assembly and/or at least two-thirds of the States parties of the respective treaties.³⁰⁸ Past experience of amendments to international human rights treaties suggests that the process would be long, and even if an amendment is adopted, it only binds the States that have accepted it.³⁰⁹ It is virtually inconceivable that States would have the political will to initiate the amendment proposals and to advocate for sufficient support for the amendment to take effect.

While the adoption of Protocol No 14 of the ECHR, which provides for the opportunity of the EU's accession, serves as an example of States agreeing to expand the participation in a human rights treaty to include a non-State entity, its success is unlikely to be duplicated in the case of unrecognised entities. Firstly, some of the imperatives fuelling the debate on the EU's accession to the ECHR are unique to the situation in Europe. For instance, one of the reasons for advocating the EU's accession is to achieve coherence between ECHR and EU laws and avoid discrepancies between jurisprudence of the Strasbourg and Luxembourg Courts – a goal that has been reiterated by various actors of both the Council of Europe and the EU.³¹⁰ Also, the call for accession to the ECHR relates to the EU's

³⁰⁸ Eg International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195, art 23; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, art 29; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 51; Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13, art 26; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, art 29.

³⁰⁹ Michael Bowman, 'Towards a Unified Treaty Body for Monitoring Compliance with UN Human Rights Conventions? Legal Mechanisms for Treaty Reform' (2007) 7 Human Rights L Rev 225, 237-38.

³¹⁰ Eg European Parliament, Resolution on the Drafting of a European Union Charter of Fundamental Rights (16 March 2000) [2000] OJ C377/329 (stating that allowing the EU's accession to the ECHR would ensure "that appropriate action is taken to avoid possible conflicts or overlapping between the Court of Justice of the European Communities and the European Court of Human Rights"). See also Vaughne Miller, 'EU Accession to the European Convention on Human Rights' (22 March 2011) Standard Note SN/IA/5914, 8 <<http://www.parliament.uk/briefing-papers/SN05914.pdf>> accessed 20 August 2014.; Hans Christian

credibility in terms of its human rights policy. While the EU requests non-EU States seeking to join the organisation or to obtain development aid from the organisation to fulfil certain human rights commitments, the EU's own conduct is not subject to external scrutiny.³¹¹ Becoming a party to the ECHR to a certain extent remedies the imbalance.

Secondly, the discussions regarding expanding accession to the ECHR have always focused on the EU (or previously on the European Communities). Although the practical arrangements of accession and technical details are subject to negotiation, the target entity is clear. Attempts to include unrecognised entities would be more problematic given that it would be difficult for States to reach a consensus as to exactly how to define which non-State entities would be eligible to become parties to an international human rights treaty. The adoption of Protocol No 14 came after years of debate.³¹² While one cannot unequivocally proclaim that States would never allow unrecognised entities to formally participate as parties in multilateral international human rights treaties, it is safe to assume that such arrangements would not take place in the near future, considering that the protection gap resulting from the exclusion of unrecognised entities from multilateral human rights regimes has rarely been a subject of concern in international fora. Take the Universal Periodic Review mechanism under the UN Human Rights Council as an example: When China was under review, no discussion regarding the human rights

Krüger, 'Reflections Concerning Accession of the European Communities to the European Convention on Human Rights' (2003) 21 Penn State Intl L Rev 89, 92; Jean M Sera, 'The Case for Accession by the European Union to the European Convention for the Protection of Human Rights' (1996) 14 Boston U Intl LJ 151, 179.

³¹¹ Krüger (n 310) 94.

³¹² For a recount of the process leading to the adoption of Protocol No 14 and its content, see Lucius Caflisch, 'The Reform of the European Court of Human Rights: Protocol No. 14 and Beyond' (2006) 6 Human Rights L Rev 403.

situation in Taiwan was recorded.³¹³ In Somalia's review, although the lack of control of the Transitional Federal Government over Somaliland was noted, the recommendations raised by other States only went as far as encouraging "cooperation" with institutions in Somaliland.³¹⁴ It is unlikely that States would demonstrate enough political will to amend the existing human rights treaties to allow participation by unrecognised entities.

C. Unilateral Expression of Consent to Be Bound by Multilateral Human Rights Treaties

In addition to the abovementioned methods of engaging with other States and the existing international human rights treaty regimes,³¹⁵ ways of unilaterally expressing consent to be bound by multilateral human rights treaties have been proposed. Examples include the adoption of unilateral statements or declarations and incorporation in domestic legislation of unrecognised entities. For instance, prior to the independence of South Sudan, the Sudan People's Liberation Army of Southern Sudan, which at one point controlled what is now South Sudan and fulfilled the criteria of an unrecognised entity for the purpose of this thesis, declared its voluntary adherence to the CRC.³¹⁶ Also, Taiwan attempted to adhere to the CEDAW in 2007³¹⁷ and the ICCPR and ICESCR in 2009,³¹⁸ but its respective

³¹³ UN Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: China' (5 October 2009) UN Doc A/HRC/11/25.

³¹⁴ UN Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: Somalia' (11 July 2011) UN Doc A/HRC/18/6, paras 95, 98.44, 98.104, 98.121.

³¹⁵ The term "international human rights treaty regimes" is used in this thesis to refer to the systems created by international human rights treaties, including the treaty provisions, the bodies created by (such as UN human rights treaty bodies) or associated with (such as treaty depositories) these treaties, and the work carried out by such bodies.

³¹⁶ William G O'Neill, 'A Humanitarian Practitioner's Guide to International Human Rights Law' (1999) Thomas J Watson Jr. Institute for International Studies, Occasional Paper No 34, 12 <<http://reliefweb.int/sites/reliefweb.int/files/resources/59B3C4456435FD53C1256C1300351254-hrlaw1.pdf>> accessed 20 August 2014.

³¹⁷ Ministry of Foreign Affairs (ROC), 'Ministry of Foreign Affairs Proactively Promotes Taiwan's Participation in the "Convention on the Elimination of All Forms of Discrimination against Women"' (30 April 2007) <http://www.mofa.gov.tw/en/News_Content.aspx?n=1EADDCFD4C6EC567&sms=5B9044CF1188EE23&s=1BDBF9DEE247D7CE> accessed 20 August 2014.

³¹⁸ Office of the President (ROC), 'President Ma Signs Instruments of Ratification of Two Covenants on Human Rights' (14 May 2009) <<http://english.president.gov.tw/Default>>

instruments of accession and ratification were rejected by the UN Secretariat.³¹⁹ Still, Taiwan has subsequently begun the process of incorporating provisions of these treaties into its domestic legal system and has prepared reports on the implementation of treaty provisions, in accordance with the reporting requirement of the treaties. The President has also repeatedly emphasised Taiwan's determination to bring domestic human rights protection in line with the standards set in these treaties.³²⁰ All these measures serve as evidence that, although not accepted by the depository of CEDAW, ICCPR, and ICSECR, Taiwan has unilaterally expressed its consent to be bound by these instruments. In order to explore the legal effect of unilateral declarations by unrecognised entities, the discussion below analyses the unilateral declarations of States and non-State armed groups to see whether support can be found that unilateral declarations of unrecognised entities create binding international legal obligations.

Under international law, unilateral declarations made by States can sometimes be considered to create binding legal obligations. The ICJ in the *Nuclear Tests Case* ruled that "[w]hen it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration".³²¹ International jurisprudence has consistently emphasised that these criteria should be strictly interpreted and the decision to attribute binding force to unilateral

aspx?tabid=491&itemid=19415> accessed 20 August 2014.

³¹⁹ See Chapter 5, Sections III.A.2 and III.B.2.

³²⁰ Eg Office of the President (ROC), 'President Ma Ying-jeou's National Day Address' (10 October 2010) <<http://english.president.gov.tw/Default.aspx?tabid=491&itemid=22495>> accessed 20 August 2014. The domestication of these treaties is discussed in detail in Chapter 5, Section III.B.2.c.

³²¹ *Nuclear Tests (Australia v France)* [1974] ICJ Rep 253, para 43.

declarations of a State should not be made lightly.³²² Doubts have been expressed as to whether the ICJ acknowledged unilateral declarations as a new source of law,³²³ and criticism of the judgment even suggests that the Court might have acted *ultra vires*, since it is not mandated to decide cases based on sources of law not stipulated in Article 38(1) of the ICJ Statute.³²⁴ Nevertheless, international courts and legal scholars have generally accepted that if a State makes a public declaration manifesting an intention to be bound by the terms of that declaration, the declaration will then create legal obligations for the State in question.³²⁵

However, the legal effect of unilateral declarations by non-State actors remains unclear. Instances of unilateral expressions of consent to be bound by an international treaty can be observed in areas other than human rights law.³²⁶ The basis of legal effect of such unilateral expressions often derives from a special arrangement during the negotiation of the respective treaties and the consent of parties to the treaties. For instance, the Additional Protocol of the Railway Conventions of 1952 and 1961 enabled "States or territorial parts of states" to adopt the Conventions by incorporating the provisions in their respective domestic legislation.³²⁷ In 1964, the Eastern and Western parts of Germany notified the depository, the Swiss Government, of the introduction of provisions of the Railway Conventions in their domestic laws, and the depository accordingly informed other member States that the

³²² *ibid* para 44; *North Sea Continental Shelf (Germany v Denmark; Germany v Netherlands)* [1969] ICJ Rep 3, paras 27-28; WTO, *United States: Sections 301-310 of the Trade Act of 1974*—Report of the Panel (22 December 1999) WT/DS152/R, para 7.118; *Case Concerning the Frontier Dispute (Burkina Faso v Mali)* [1985] ICJ Rep 554.

³²³ Hugh Thirlway, 'The Sources of International Law' in Evans (ed) (n 189) 112.

³²⁴ Alfred P Rubin, 'The International Legal Effects of Unilateral Declarations' (1977) 71 AJIL 1, 29.

³²⁵ ILC, 'Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, with Commentaries thereto' Yearbook of the International Law Commission, 2006, vol II(2) (2006) UN Doc A/CN.4/SER.A/2006/Add.1 (Part 2) 370.

³²⁶ Bot (n 288) 123-30.

³²⁷ *ibid* 128-30.

Conventions would thus be applicable in both parts of Germany as of 1 January 1965.³²⁸ Without the adoption of the Additional Protocol, it is doubtful that unilateral incorporation of treaty provisions in domestic law would of itself give rise to the applicability of the Railway Conventions in both parts of Germany.

In addition, in the context of armed conflicts, the practice of NLMs and non-State armed groups issuing unilateral declarations to commit to be bound by legal instruments of international humanitarian and human rights law can be of reference here. Many such declarations have been sent to the ICRC and Geneva Call. The latter collects signatures of non-State actors in the form of adherence to Deeds of Commitment concerning the ban on anti-personnel mines, protection of children from the effects of armed conflicts, and prohibition of sexual violence and elimination of gender discrimination.³²⁹ Particular references to human rights law can also be observed in some of these declarations. For instance, the Ogaden National Liberation Front, an armed group in Ethiopia seeking the realisation of Ogaden People's right to self-determination, has indicated in its Political Programme that it "shall adhere to all relevant international agreements on human rights including the Universal Declaration on Human Rights".³³⁰ It has been argued that, although the legal effect of each unilateral declaration by non-State armed groups should be determined on a case-by-case basis, some of these declarations should be considered binding under international law.³³¹ The ICJ has noted that the unilateral declaration by Palestine on 7 June 1982 expressing its intention to comply

³²⁸ *ibid.*

³²⁹ Geneva Call, a non-governmental organisation, develops and receives Deeds of Commitment of non-State armed groups. Geneva Call, 'Deeds of Commitment' <<http://www.genevacall.org/how-we-work/deed-of-commitment/>> accessed 20 August 2014.

³³⁰ Ogaden National Liberation Front (ONLF), 'Political Programme' <http://onlf.org/?page_id=16> accessed 20 August 2014.

³³¹ Roberts and Sivakumaran (n 154) 141-43; Sivakumaran (n 150) 118-24.

with the Fourth Geneva Convention was considered “valid” by the depository of the Convention.³³² However, neither the depository nor the ICJ further explained whether such a “valid” unilateral declaration created obligations for Palestine under the Convention.

Returning to the legal effect of unilateral declarations issued by unrecognised entities expressing the intention to be bound by international human rights treaties, this thesis argues that such declarations should create international legal obligations upon the unrecognised entities in question. Firstly, this thesis contends that the source of the binding force of these declarations relates to the capacity of unrecognised entities to conclude and participate in international human rights treaties. Víctor Rodríguez Cedeño, the ILC’s Special Rapporteur on the issue of unilateral acts of States, analysed a wide array of unilateral acts by States and concluded that, as in the law of treaties, a State is endowed with “international capacity ... to commit itself or develop legal relations at the international level through unilateral acts”, and that Article 6 of the 1969 Vienna Convention (on the treaty-making capacity of States) might be “fully transferable to any legal regime on unilateral acts which may be established”.³³³ The ILC appears to have endorsed this linkage between the capacity of States to issue unilateral declarations creating binding legal obligations and their treaty-making capacity. In its commentaries to the Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, the ILC stated that “just as ‘(e)very State possesses capacity to conclude treaties’, every State can commit itself through acts whereby it unilaterally undertakes legal obligations”.³³⁴

³³² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 211) para 91.

³³³ ILC, ‘Eighth Report on Unilateral Acts of States by Víctor Rodríguez Cedeño, Special Rapporteur’ (26 May 2005) UN Doc A/CN.4/557, para 172.

³³⁴ ILC, ‘Guiding Principles Applicable to Unilateral Declarations of States’ (n 325) 371.

Based on this rationale, if a subject of international law possesses the capacity to enter into treaty relations and profess its intention to be bound through means of bilateral or multilateral agreements, it can do so through unilateral declarations. In addition, as previously demonstrated, the official participation by unrecognised parties as parties to multilateral international human rights treaties appears to be impossible at present. Allowing them to adhere to these instruments by way of unilateral declarations can remedy the legal vacuum created by excluding them from treaty participation.

V. Conclusion

While the term “treaty” has traditionally been restricted to agreements concluded between States, the drafting histories of both 1969 and 1986 Vienna Conventions on the Law of Treaties and other developments of international law demonstrate that increasingly non-State actors have taken on the role of treaty-makers. A closer look at international jurisprudence, the work of the ILC, and relevant practice reveals that treaty-making capacity is no longer exclusive to States. International organisations, insurgents, NLMs, and international territorial administrations also possess such capacity, even though their capacity might be subject to limitations, unlike that of a State.

After analysing the treaty-making capacity of different categories of actors and the sources of the capacity, this thesis argues that the treaty-making capacity of unrecognised entities in relation to international human rights treaties should be acknowledged on two bases. The first basis relies on the declaratory theory of recognition and reasons that since unrecognised entities fulfil the criteria of statehood, they should be considered as States. Thus, their status as States implies the possession of treaty-making

capacity, an essential “attribute of State sovereignty”. The second basis draws upon the notion of necessity, which was proposed by the ICJ to determine the capacities for a subject of international law to act at the international level. The notion also serves to interpret the treaty-making capacity of international organisations and insurgents. The necessity of acknowledging the capacity of unrecognised entities to conclude or participate in international human rights treaties is particularly evident when the special characteristics of such treaties are taken into consideration. The requirement of a national system to respect, protect and fulfil rights enumerated in international human rights treaties, combined with the lack of control of “parent States” in the territory governed by unrecognised entities, leads to the need to acknowledge the treaty-making capacity in this regard. Additionally, the principle of continuity of international human rights treaty obligations contributes to the necessity of allowing unrecognised entities to bear obligations under international human rights treaties to which their respective former governing States are parties.

Of course granting unrecognised entities the capacity to conclude or participate in international human rights treaties is not without concern. There are four plausible reasons for refusing to grant unrecognised entities such a capacity: the danger of improperly legitimising the entity in question; the fear of implied recognition; the possibility of the entity lacking ability to protect and fulfil human rights; and the risk of downgrading standards of protection. However, this thesis argues that these concerns are in fact not supported by empirical evidence, and that they should not impede the acknowledgement of the capacity of unrecognised entities to conclude or participate in international human rights treaties.

Finally, if it is accepted that unrecognised entities have treaty-making capacity, some consideration needs to be afforded to how these entities can express their consent to be bound. Since official participation of unrecognised entities in multilateral human rights treaties seems implausible at present, the thesis proposes that an unrecognised entity can express its consent to be bound by international human rights norms by concluding bilateral human rights treaties with other actors who possess treaty-making capacity and issuing unilateral declarations committing itself to undertakings in existing human rights instruments. Practice has seen the adoption of both methods, and this thesis argues, provided that the bilateral treaty or the unilateral declaration in question clearly demonstrates the intention to create binding legal obligations, the unrecognised entity who is a party to the agreement or the issuer of the unilateral declaration should find itself bound by the agreement or declaration under international law. Only through allowing the unrecognised entities to adopt these methods can the treaty-making capacity in relation to human rights treaties be realised, and the necessity of granting such capacity be addressed.

The numbers of international human rights treaties and their ratifications have multiplied since the establishment of the UN. Still, human rights treaty regimes do not provide a satisfactory system of protection by themselves considering that many States remain outside of them.³³⁵ Similarly, even if the capacity of unrecognised entities to conclude or to participate in international human rights treaties is recognised, many of them have not expressed consent to be bound by such treaties, or have only consented to a few of them. Besides, treaties are not the sole source

³³⁵ Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' (1992) 12 Australian YB Intl L 82, 82.

of obligations under international law.³³⁶ Therefore, in order to fully understand the application of international human rights law to unrecognised entities, there is still need to study whether and to what extent they are bound by general international human rights law. This will be focus of the next chapter.

³³⁶ See Chapter 1, Section II.A.

CHAPTER 4
GENERAL INTERNATIONAL HUMAN RIGHTS LAW
AND UNRECOGNISED ENTITIES

I. Introduction

As explained in the first chapter of this thesis, the term “general international human rights law” refers to all non-treaty rules of international human rights law. Article 38 of the Statute of the ICJ reflects the “universal perception as to the enumeration of sources of international law”¹ and lays down both primary sources (international conventions, international custom, and the general principles of law recognized by civilized nations) and subsidiary means for the determination of international law (judicial decisions and the teachings of the most highly qualified publicists of the various nations). Since the latter category is used to interpret primary sources and do not directly create binding legal obligations, for the purpose of the present chapter, the focus here is the primary sources of general international law: international custom and general principles of international law.

The chapter begins, in Section II, by analysing the different sources of general international human rights law and providing theoretical bases for the binding force of general international law. Section III explores whether different categories of non-State actors are bound by general international human rights law and discusses the potential bases of such binding force. Section IV then turns the focus to unrecognised entities. Drawing from the principles and discussions in Sections II and III, this section of the chapter

¹ Malcolm N Shaw, *International Law* (6th edn, CUP 2008) 71. See also James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 22; Hugh Thirlway, 'The Sources of International Law' in Malcolm D Evans (ed), *International Law* (4th edn, OUP 2014) 95; Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law*, vol 1 (Introduction and Part 1) (9th edn, Longman 1992) 24.

attempts to provide a theoretical framework that justifies the applicability of general international human rights law to unrecognised entities.

II. Sources of General International Human Rights Law and the Bases of their Binding Force

The focus of this chapter is the primary non-treaty sources of international human rights law, that is, international custom and general principles of international law, and the bases of their binding force. While peremptory norms are not listed as a standalone source of international law by Article 38(1) of the ICJ Statute, the following discussion considers the notion of peremptory norms independently for two reasons. Firstly, the categorisation of peremptory norms is subject to debate, and while some consider them to be a special set of customary rules,² others hold the view that they form a part of the general principles of international law.³ Still others acknowledge the higher status of peremptory norms but do not associate them specifically to either source of international law.⁴ Secondly, the distinct and absolute nature of the authority of peremptory norms requires a different theoretical basis to justify their binding force. Therefore, it is necessary to include a separate discussion on peremptory norms.

A. International Custom

1. Criteria

² Eg David Harris, *Cases and Materials on International Law* (7th edn, Sweet & Maxwell 2010) 32; Thirlway, 'The Sources of International Law' (n 1) 115; Alan Brudner, 'The Domestic Enforcement of International Covenants on Human Rights: A Theoretical Framework' (1985) 35 U Toronto LJ 219, 249.

³ Eg Crawford, *Brownlie's* (n 1) 37. See also Mary Ellen O'Connell, 'The Natural Superiority of Courts' in Ulrich Fastenrath and other (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (OUP 2011) 1044; Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' (1992) 12 Australian YB Intl L 82, 102-06.

⁴ Shaw (n 1) 124; Jennings and Watts (eds) (n 1) 45-50.

Article 38(1)(b) of the ICJ Statute provides the most-cited definition of customary international law: "evidence of a general practice accepted as law".⁵ In other words, in order for a rule to become an international custom, it must be proven that States in general have a continuous habit of conducting themselves in a particular manner with the belief that they are obligated under international law to act in that manner. Two criteria thus derive from the notion of international custom: general State practice and *opinio juris*.

International jurisprudence and scholarly writings provide numerous examples of conducts that are considered State practice: for instance, diplomatic correspondence and exchanges, official statements, legislation, judicial decisions, participation in international meetings, as well as other acts undertaken at the international level.⁶ With regard to the element of generality, it is important to note that complete uniformity is not necessary. Although the ICJ in the *Asylum* case pronounced that the party invoking a customary rule must prove that the rule in question is consistent with "a constant and uniform usage",⁷ the Court in the *Nicaragua Case* specified that it did not consider that "for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule".⁸ In addition, practice of every State is not necessarily given equal weight. Depending on the rule in question, the attitude of States that are "specially affected" is sometimes granted special consideration.⁹ While it often takes a long time for a rule to develop and become accepted and practised by States, thus acquiring customary status, the time needed for

⁵ Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993 (ICJ Statute), art 38(1)(b).

⁶ Crawford, *Brownlie's* (n 1) 24; Shaw (n 1) 82.

⁷ *Asylum Case (Colombia v Peru)* [1950] ICJ Rep 266, 276.

⁸ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)* [1986] ICJ Rep 14, para 186 (*Nicaragua Case*).

⁹ *North Sea Continental Shelf (Germany v Denmark; Germany v Netherlands)* [1969] ICJ Rep 3, paras 74.

the formation of each custom varies “according to the nature of the case”.¹⁰ Therefore, since it is possible for a customary rule to form within a short period of time, “duration” is not in and of itself a required element of customary international law. It has even been argued that given special circumstances, “instant” customary international law is possible.¹¹

On the other hand, *opinio juris* denotes the subjective element of custom and distinguishes custom from “usage”.¹² It requires that States engaged in certain practice actually believe that they are obligated under international law to do so.¹³ In the *Nicaragua Case*, the ICJ emphasised that “either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is ‘evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it’”.¹⁴ While the criterion of *opinio juris* appears to be abstract and its existence difficult to prove, the ICJ has at times turned to UN General Assembly resolutions, codification conventions, and the work of the UN ILC for evidence of *opinio juris*.¹⁵ For instance, in the *Nicaragua Case*, the Court reasoned that the existence of “*opinio juris* may, though with all due caution, be deduced from ... the attitude of the Parties and the attitude of States towards certain General Assembly resolutions”, and, in that case, Resolution 2625, the Friendly Relations Declaration.¹⁶ The ICJ in the *North Sea Continental Shelf* cases took a different approach and looked to “the work done in this field by international legal bodies, on State

¹⁰ Humphrey Waldock, ‘General Course on Public International Law’ (1962) 106 Recueil des Cours 1, 44.

¹¹ Bin Cheng, ‘United Nations Resolutions on Outer Space: Instant International Customary Law’ (1965) 5 Indian J Intl L 23.

¹² Ian Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 6; Crawford, *Brownlie’s* (n 1) 23.

¹³ Andrew Clapham, *Brierly’s Law of Nations* (OUP 2012) 59.

¹⁴ *Nicaragua Case* (n 8) para 207. (quoting the ICJ’s judgment in the *North Sea Continental Shelf* cases).

¹⁵ Shaw (n 1) 88-9; Alain Pellet, ‘Article 38’ in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (OUP 2012) 820-24.

¹⁶ Eg *Nicaragua Case* (n 8) para 188.

practice and on the influence attributed to the Geneva Convention [of 1958 on the Continental Shelf] itself” to examine whether there was cumulative evidence of the requisite *opinio juris* to determine the existence of new customary norms.¹⁷ The ICJ’s reference to the work of the ILC can be observed in the *Gabčíkovo-Nagymaros Project Case*.¹⁸

In terms of the formation of custom, it has been argued that customary international human rights law differs from customary international law in general. According to this school of thought, in the context of customary international human rights law, the criterion of *opinio juris* should carry more weight than State practice, and such a method would render identifying human rights customary norms a simpler task. Supporters of this method find support in the ICJ’s opinion in the *Nicaragua Case*, where the Court evaluated the customary status of the prohibition of the use of force. The Court reasoned that:

In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.¹⁹

According to Wouters and Ryngaert, the ICJ’s approach in this regard considered determining the existence of *opinio juris* to be the priority in examining whether a particular rule has obtained customary status.²⁰ Yet,

¹⁷ *North Sea Continental Shelf* (n 9) para 37.

¹⁸ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7, paras 47, 50-54. 58.

¹⁹ *Nicaragua Case* (n 8) para 186.

²⁰ Jan Wouters and Cedric Ryngaert, ‘Impact of the Process of the Formation of Customary International Law’ in Menno T Kamminga and Martin Scheinin (eds), *The Impact of Human Rights Law on General International Law* (OUP 2009) 113.

since the rule examined by the ICJ in the *Nicaragua Case* – the prohibition of the use of force – is not a human rights norm, doubts may be raised as to if and why the Court's approach can be extrapolated to the field of human rights, and two school of thoughts were formed on this issue.

Those advocating extrapolation point to the characteristics common to both fields: the existence of strong *opinio juris* and the apparent gap between what States consider lawful and what States practice.²¹ With regard to the law on the use of force, the UN Charter²² and numerous relevant General Assembly resolutions²³ reflect the convictions of States that international law in principle prohibits the use of force, but international practice often sees flagrant violations of such a prohibition. As for human rights law, the *opinio juris* of States can be clearly deduced from the conclusion and participation in numerous international human rights instruments, while it can be observed that State practice often departs from the commitment of States. Given these gaps between *opinio juris* and practice, identifying customary human rights norms in the traditional manner would be a difficult task. Therefore, Schachter suggests that when ascertaining the customary status of a human rights norm, one needs to rely on evidence and considerations different from those taken into account by the traditional approach to custom formation.²⁴ In other words, the method of determining the customary status of a rule adopted by the ICJ in the *Nicaragua Case* may be applied in cases of human rights norms, and sufficient evidence of *opinio juris* would create a strong

²¹ *ibid* 114.

²² Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art 2(4).

²³ Eg UNGA Res 2625 (XXV) (24 October 1970) UN Doc A/RES/2625(XXV); UNGA Res 3314 (XXIX) (14 December 1974) UN Doc A/RES/3314(XXIX).

²⁴ Oscar Schachter, 'International Law in Theory and Practice, General Course in Public International Law' (1982) 178 *Recueil des Cours* 9, 334-35.

assumption that the human rights norm in question has in fact achieved customary status.²⁵

However, Simma and Alston argue that this approach de-emphasises the element of State practice and is perhaps better suited to cases involving rules that have been gradually established with the support of State practice but challenged by subsequent inconsistent practice.²⁶ Furthermore, there is no need to adopt a different approach when identifying customary human rights norms, as opposed to customary norms in general, since State practice in fact matches *opinio juris*.²⁷ This view is adopted in the present thesis, especially in light of the contemporary developments in the field of human rights. Although it remains true that violations of human rights constantly challenge the statement that customary human rights law does exist and is supported by uniform State practice, it is important to point out that nowadays, such violations are often met with condemnation by States and international actors. At the time when Schachter wrote in support of adopting a different approach in identifying customary human rights, "States [did] not usually ... protest violations that [did] not affect their nationals", and "[a]rbitral awards and international judicial decisions [were] also rare except in tribunals based on treaties such as the European and Inter-American courts of human rights".²⁸ Nevertheless, as pointed out by Simma and Alston, at the international level, especially in the context of the UN, practice has in fact confirmed the existence of customary human rights law. In addition to the adoption of resolutions by the UN General

²⁵ Wouters and Ryngaert (n 20) 114; Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (OUP 1989) 94.

²⁶ Simma and Alston (n 3) 96-97; Bruno Simma, 'International Human Rights and General International Law: A Comparative Analysis' (1993) 4(2) *Collected Courses of the Academy of European Law*, 153, 220.

²⁷ Simma and Alston (n 3) 98-99; Simma, 'International Human Rights and General International Law' (n 26) 221-22.

²⁸ Schachter, 'General Course in Public International Law' (n 24) 334.

Assembly, the former UN Commission on Human Rights and the current UN Human Rights Council, consistently reiterating standards of human rights protection, serious violations are discussed in public debates among States and responded to with condemnation and even sanctions. Even though Member States of the latter two organs do not represent all States of the international community, their practice represents the attitudes of the participating States. In addition, mechanisms such as the Universal Periodic Review conducted by member and observer States of the Human Rights Council, the scope of which reaches beyond international human rights treaties,²⁹ routinely scrutinise the human rights practice of all States and identify gaps in protection. While considerations of human rights treaty obligations form an essential basis of the abovementioned practice of UN bodies and their Member States, it is undeniable that universal standards, such as those set in the Universal Declaration of Human Rights, have been repeatedly referred to and confirmed, providing strong evidence of the formation of customary human rights law.

2. Basis of Authority

a. The Theory of Consent

The theory of consent has long been put forward to explain the basis of the binding force of customary international law,³⁰ and the theory builds on the will of States, as demonstrated in the form of expressed or inferred

²⁹ According to Resolution 5/1 of the Human Rights Council, the basis of the review is a) the UN Charter; b) the Universal Declaration of Human Rights; c) Human rights instruments to which a State is party, and d) Voluntary pledges and commitments made by States, including those undertaken when presenting their candidatures for election to the Human Rights Council.

³⁰ Emer de Vattel, *The Law of Nations, or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns: From the French of Monsieur de Vattel* (G G and J Robinson, Paternoster-Row 1797) lxvi. (These three kinds of law of nations, the *voluntary*, the *conventional* and the *customary*, together constitute the *positive law of nations*. For they all proceed from the will of nations, the *voluntary* from their presumed consent, the *conventional* from an express consent, and the *customary* from tacit consent.)

consent, acquiescence, or presumed acceptance. In 1927, the PCIJ in the *Lotus Case* pronounced that:

The rules of law binding upon States ... emanate from their own free will as expressed ... by usages generally accepted as expressing principles of law and established in order to regulate the relations between those co-existing independent communities or with a view to the achievement of common aims.³¹

The statement above reflects the theory of consent, which suggests that States are independent entities and are only bound by the rules to which they have agreed. While State consent to treaties is usually provided explicitly, through signatures, accessions, or ratifications, consent to international custom is often inferred.³² The absence of objection from a State to a particular developing customary norm is often interpreted as inferred consent or acquiescence. Wolfke, who also emphasises the importance of the will of States, proposes that States are bound by a given rule of customary international law due to their “presumed acceptance of a practice as an expression of law”.³³

Critics of the theory of consent consider that it fails to provide a satisfactory justification of the authority of customary international law. It has been argued that, according to the consent theory, if the consent of States were required for a rule to bind them, it would also be required that States consented that their consent carried such an effect.³⁴ In other

³¹ *SS Lotus (France v Turkey)* [1927] PCIJ Rep Series A No 9, 18.

³² Michael Byers, *Custom, Power and the Power of Rules* (CUP 1999) 412.

³³ Karol Wolfke, *Customs in Present International Law* (2nd rev edn, Martinus Nijhoff Publishers 1993) 161.

³⁴ Gerald Fitzmaurice, ‘The General Principles of International Law Considered from the Standpoint of the Rule of Law’ (1957) 92 *Recueil des Cours* 1, 43.

words, each consent that gave rise to an obligation must be supported by a prior consent. This presents the danger of an "infinite regress".³⁵ In addition, critics of the consent theory argue that it has the following shortcomings. Firstly, the theory does not explain why States that come into being after the formation of certain customary norms and thus have not had the opportunity to voice consent or objection would nevertheless be bound by the customary norms in question.³⁶ Secondly, when a rule is supported by general State practice with the conviction of legal obligation, the States that stay silent and do not persistently object to the formation of this international custom are usually deemed to have consented to the rule in question, or at least acquiesced. Such consent thus binds the silent States to the new international custom. However, such silence is not necessarily indicative of a State's acceptance of the rule. Besides, it is excessive to require each State to learn about and respond to every act of every other State and to object to every act with which it disagrees in order to influence the formation of a new customary rule.³⁷ It has even been argued that "consent drawn from silence is a dubious form of consent".³⁸ In short, using consent as the sole basis of the authority of customary international law might be problematic: the State consent that allegedly supports customary norms may be in fact fictitious.

Nonetheless, there are counter-arguments that support maintaining the element of consent or presumed acceptance as the basis for the binding force of customary international law. With regard to the first shortcoming introduced above, it has been proposed that the element of consent or presumed acceptance does not require that all States bound by a

³⁵ *ibid.*

³⁶ Shaw (n 1) 9.

³⁷ *ibid* 90-91.

³⁸ Samuel Estreicher, 'Rethinking the Binding Effect of Customary International Law' (2004) 44 Virginia J Intl L 5, 8.

customary norm must have participated in its formation.³⁹ In the case of a new State, once it has taken part in international life and engaged in the practice already established as a customary norm without raising objections, the consent inferred is not fictitious. With regard to the second shortcoming proposed, given the convenient flow of information and the increased exchanges between States, it may be argued that it is no longer a heavy burden for States to learn about each other's behaviours and positions regarding a particular international law issue. In particular, various international meetings, fora within international organisations, and mechanisms for dispute resolution provide States the chance to both take note of and respond to the practice of other States. Additionally, nowadays State practice regarding international law has been much better documented and accessible either in the form of official State publications, records and documents of international institutions, or even in scholarly writings. According to this line of argument, now that it is easier for a State to learn about and react to the practice of other States and the formation of a new rule, if the State chooses to not object to the rule, it is reasonable to presume its acceptance. Therefore, a State's consent to a given customary rule is not manifested out of thin air. Instead, it derives from the State's knowledge of other States' practice and from the action or inaction of the State in question. Such consent serves as the basis of the binding force of customary rules.

While it is true that with modern technology and increased inter-State interactions, it has become easier for a State to be mindful of the practice of other States, it is the opinion of this thesis that it remains challenging for a State to know *every* aspect of the practice of *all* other States. This is especially true in cases of States with fewer resources devoted to foreign

³⁹ Wolfke (n 33) 165.

relations and issues of international law. Additionally, even if the arguments supporting the consent theory stand, the theory of consent is still challenged by the principle of persistent objector and its restrictions. The discussions below address these challenges and attempt to provide further bases for the authority of international custom.

*b. The Principle of Persistent Objector and the Prohibition of
"Subsequent Objectors"*

If State consent forms the basis of authority for customary international law, it naturally follows that a State may distance itself from the otherwise uniform practice by expressing its dissent concerning a purported customary rule. While States might object to a customary rule during its formation or after it obtains customary status,⁴⁰ the ICJ seems to acknowledge the former as a ground for precluding the binding force of a customary rule upon the objecting State.⁴¹ In the *Anglo-Norwegian Fisheries* case before the ICJ, the United Kingdom contended that the 10-sea-mile rule for the closing lines of bays should be regarded as a rule of international law. After finding that conflicting State practice in this regard suggested this rule had not yet been generally accepted, the Court went on to rule that "[i]n any event the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast".⁴² A similar statement can be found in the *Asylum* case, where the Court considered that Peru was not

⁴⁰ Mark E Villiger, *Customary International Law and Treaties* (Kluwer Law Intl 1997) 33.

⁴¹ Fitzmaurice, while analysing the *Anglo-Norwegian Fisheries Case*, emphasised that:
The essence of the matter is dissent from the rule *while it is in process of becoming one, and before it has crystallized into a definite and generally accepted rule of law*. The Court's finding is not therefore to the effect that a State can at any time exempt itself from an *established* rule by opposing the application to itself of that rule.

Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law' (1953) 30 British YB Intl L 1, 26 (emphasis original).

⁴² *Anglo-Norwegian Fisheries Case (UK v Norway)* [1951] ICJ Rep 116, 131.

bound by the rule invoked by Colombia concerning diplomatic asylum because a) Peru did not ratify the conventions codifying such a rule; and b) even if the rule had acquired customary status, considering that Peru repudiated the rule by not ratifying the relevant conventions, such a custom could not be asserted against Peru.⁴³ The Court did not specifically elaborate on why either Peru or Norway qualified as a persistent objector. Nor did it justify why this principle can be legitimately invoked to exclude the applicability of customary norms to the objectors. Still, it can nevertheless be observed that the ICJ recognises the effect of persistent objection. Since then, the principle of persistent objector has received much support.⁴⁴

Nevertheless, practice has seldom seen States invoke this principle as a ground for exemption of customary obligations;⁴⁵ a fact that has prompted some commentators to question the existence of such a principle.⁴⁶ One possible explanation for the lack of practice is that the State acting contrary to a customary norm tends to argue that the norm in question does not exist (or has not obtained customary status), rather than it has persistently objected to the norm's formation.⁴⁷ Those denying the

⁴³ *Asylum Case* (n 7) 277-78.

⁴⁴ Eg Waldock (n 10) 49-50; Restatement (Third) of Foreign Relations Law of the United States, § 102 (1987) Comment d; I M Lobo de Souza, 'The Role of State Consent in the Customary Process' (1995) 44 ICLQ 521, 533; Crawford, *Brownlie's* (n 1) 28.

⁴⁵ Hugh Thirlway, *The Sources of International Law* (OUP 2014) 87; Lori F Damrosch and others, *International Law: Cases and Materials* (5th edn, West Academic Publishing 2009) 102; Patrick Dumberry, 'Incoherent and Ineffective: The Concept of Persistent Objector Revisited' (2010) 59 ICLQ 779, 791-94.

⁴⁶ Jonathan I Charney, 'Universal International Law' (1993) 87 AJIL 529, 538-40 (arguing that considering the principle has rarely been invoked, the principle is "open to serious doubt", and that "state practice and other evidence do not support the existence of the persistent objector rule".); Antonio Cassese, *International Law* (2nd edn, OUP 2005) 163 (also arguing that such lack of practice suggests "no firm support" and that "a State is not entitled to claim that it is not bound by a new customary rule because it consistently opposed it before it ripened into a customary rule".). See also J Patrick Kelly, 'The Twilight of Customary International Law' (2000) 40 Virginia J Intl L 449, 512.

⁴⁷ International Law Association, Committee on Formation of Customary (General) International Law, 'Statement of Principles Applicable to the Formation of General Customary International Law' (2010) 28 <<http://www.ila-hq.org/download.cfm/docid/A709CDEB-92D6-4CFA-A61C4CA30217F376>> accessed 20 August 2014; CL Lim and Olufemi Elias, 'Withdrawing from Custom and the Paradox of Consensualism in International Law' (2010) 21 Duke J Comp & Intl L 143, 151.

existence of the persistent objector principle also point to its ineffectiveness and logical inconsistencies, which are most evidently reflected in the exceptions to the principle. One example provided to support such an argument is the exception of peremptory norms, which renders the application of the principle of persistent objector incoherent.⁴⁸ With regard to the exception of peremptory norms, an analogy may be drawn to the regime of treaty law. According to Article 53 of the 1969 Vienna Convention on the Law of Treaties, treaties in conflict with peremptory norms are void. In general, States possess the capacity and the right to enter into treaty relations on matters of their choice and with terms mutually agreed upon with other States. The fact that this capacity and right are subject to norms of a higher hierarchy does not negate the fact that States possess them. Applying the same rationale to the principle of persistent objector, the fact that a State cannot invoke the principle against a peremptory norm should not be used as ground for denying the existence of such a principle.

Provided that the principle of persistent objector may be invoked to preclude the binding force of a customary rule upon the objecting State, the fact that States cannot object to a rule once it has obtained customary status and that new States cannot opt out of any existing obligations arising from a customary norm suggests the principle does not allow “subsequent objectors”. It may be argued that by agreeing to become a part of the community of States, the new State in question has in fact consented to be bound by existing customary norms.⁴⁹ While it is generally agreed that a State cannot withdraw from existing custom,⁵⁰

⁴⁸ Dumberry (n 45) 797-99; Charney (n 46) 541.

⁴⁹ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2005) 313, n 23 (ultimately concluding that such an argument does not justify the continuing binding force of custom on existing States).

⁵⁰ See eg Michael P. Scharf, *Customary International Law in Times of Fundamental Change*:

little justification has been given as to how such a restriction can be reconciled with the theory of consent.⁵¹ The requirement of timeliness of a State's expression of objection to a certain rule hints that consent is not the sole basis of authority of international custom.

c. An Alternative Theory: Social Necessity

As demonstrated above, many writers have indeed questioned the role of consent as the basis of authority for international custom, and one alternative theory proposed to justify the binding force of custom on subsequent objecting States is the notion of "social necessity".⁵² The consent of States may recognise a rule after the establishment of such a rule, but it does not *create* it.⁵³ It has been argued that "the States which initiate the practice which is to grow into a rule of customary international law act under the influence of an *opinio necessitates* ... an opinion that the practice in question is necessary as law, not merely as a matter of convenience".⁵⁴ According to this theory, the customary rules are binding "because no social life can exist without [them]".⁵⁵ In other words, if a rule is a necessary condition of the international society, such a rule must be binding in order to serve its function, irrespective of the consent of States.⁵⁶ Even new States, which have not played any role in the formation of existing customary international law, are automatically bound by it. Thus, these rules exist on the basis of justice and common interest and because members of the international community consider "order and

Recognizing Grotian Moments (CUP 2013) 30.

⁵¹ Curtis A Bradley and Mitu Gulati, 'Withdrawing from International Custom' (2010) Yale LJ 202, 205.

⁵² Fitzmaurice, 'The General Principles' (n 34) 98.

⁵³ *ibid* 98.

⁵⁴ H W A Thirlway, *International Customary Law and Codification: An Examination of the Continuing Role of Custom in the Present Period of Codification of International Law* (Martinus Nijhoff Publishers 1972) 55.

⁵⁵ Koskenniemi (n 49) 169.

⁵⁶ Fitzmaurice, 'The General Principles' (n 34) 39.

not chaos is the governing principle of the world in which they have to live”, rather than solely on the basis of the will of the States.⁵⁷

B. General Principles of Law

1. Criteria

Many opinions have been expressed regarding the meaning, characteristics and functions of “the general principles of law recognised by civilized nations” referred to in Article 38(1)(c) of the ICJ Statute. The reference to “civilized nations” was originally thought to be necessary in order to exclude certain primitive communities, but it is now generally considered redundant, and all States of the international community are deemed “civilized” for the purpose of this provision.⁵⁸ Beyond this, the meaning of the term remains disputed, and the ICJ has yet to specifically apply Article 38(1)(c) in its judgments.⁵⁹ Some consider that the term can be interpreted to include “general principles applicable directly to international legal relations, and general principles applicable to legal relations generally”.⁶⁰ Others consider the Article 38(1)(c) principles to be those that are common across various domestic legal systems,⁶¹ and this can be observed in the drafting history of Article 38(3) of the PCIJ Statute, which is later repeated in Article 38(1)(c) of the ICJ Statute. As pointed out by Lord Phillimore, who co-authored the proposal for Article 38(3) of the PCIJ Statute, “the general principles ... were these which were accepted by all

⁵⁷ Clapham, *Brierly's Law of Nations* (n 13) 53.

⁵⁸ Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens & Sons Ltd 1953) 25.

⁵⁹ Maurice Mendelson, ‘The International Court of Justice and the Sources of International Law’ in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (CUP 1996) 79; Pellet (n 15) 832 (observing that of all of the four instances where the Court referred to Article 38(1)(c), its application was dismissed by the ICJ); Crawford, *Brownlie's* (n 1) 36 (commenting that “[g]eneral principles’ normally enter judicial reasoning without formal reference or label”).

⁶⁰ Thirlway, ‘The Sources of International Law’ (n 1) 105.

⁶¹ Eg Jennings and Watts (eds) (n 1) 37; Linda J. Maki, ‘General Principles of Human Rights Law Recognized by All Nations: Freedom from Arbitrary Arrest and Detention’ (1980) California Western Intl LJ 272, 274-77.

nations *in foro domestico*, such as certain principles of procedure, the principle of good faith, and the principle of *res judicata*, etc".⁶² This interpretation was echoed by a number of other drafters of the PCIJ Statute.⁶³ It goes without saying that the principles derived from domestic legal systems are not imported *in toto*, but only to the extent applicable to inter-State relations.⁶⁴ Schachter has provided a comprehensive list of categories of general principles of law, which seems to encompass the different interpretations mentioned above. These are:

- (1) The principles of municipal law "recognized by civilized nations";
- (2) General principles of law "derived from the specific nature of the international community";
- (3) Principles "intrinsic to the idea of law and basic to all legal systems";
- (4) Principles "valid through all kinds of societies in relationships of hierarchy and co-ordination"; and
- (5) Principles of justice founded on the "very nature of man as a rational and social being".⁶⁵

As the meaning and characteristics of general principles of international law remain disputed, the identification of such principles is a difficult task.

Although neither the PCIJ nor the ICJ has directly applied this source of international law as the basis of their reasoning, some guidance on

⁶² League of Nations, Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists, 16-24 July 1920* (Van Langenhuyzen Brothers 1920) 335.

⁶³ For instance, Mr Albert de Lapradelle "admitted that the principles which formed the bases of national law, were also sources of international law". *ibid.*

⁶⁴ *International Status of South-West Africa* (Advisory Opinion) [1950] ICJ Rep 128, 148 (Separate Opinion by Judge Sir Arnold McNair).

⁶⁵ Oscar Schachter, *International Law in Theory and Practice* (Martinus Nijhoff Publishers 1991) 50; Schachter, 'General Course in Public International Law' (n 24) 75 (footnotes omitted).

identification of these principles can be found from their jurisprudence. In the *Lotus Case*, the PCIJ interpreted the principles as “international law as it is applied between *all* nations belonging to the community of States”,⁶⁶ and such an interpretation has been suggested to imply that the Court adopted the test of universal acceptance in determining whether the proposed principles of criminal jurisdiction were in fact principles of international law.⁶⁷ This approach was rejected by Judge Tanaka in the ICJ’s *South West Africa Cases*, where he stated that “the recognition of a principle by civilized nations ... does not mean recognition by *all* civilized nations”.⁶⁸ In order to identify such principles, the Courts have turned to evidence in the domestic legal systems of representative States,⁶⁹ State conduct at the regional and international level,⁷⁰ and previous PCIJ and ICJ decisions.⁷¹

2. Basis of Authority

While general principles of international law encompass rules of a different nature, the basis of their authority is associated with the notion of “necessity”. The notion is relevant in two aspects. Firstly, when there is an absence of regulation under conventional and customary international law with regards to a specific issue, it becomes necessary to draw on principles common to various municipal legal systems or principles intrinsic to all legal systems. The inclusion of general principles as a source of law is a “response to the need for completeness of the law”,⁷² and it has been

⁶⁶ *SS Lotus* (n 31) para 37 (emphasis added).

⁶⁷ M Cherif Bassiouni, ‘A Functional Approach to “General Principles of International Law”’ (1989) 11 Michigan J Intl L 768, 788 (concluding that the Court adopted the test of “universal acceptance” in this instance but did not intend to establish it as the test for all cases).

⁶⁸ *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)* [1966] ICJ Rep 6, 299 (Dissenting Opinion of Judge Tanaka) (emphasis added).

⁶⁹ Eg ibid 148-49 (Separate Opinion of Judge McNair).

⁷⁰ Eg *Asylum Case* (n 7) 369 (Dissenting Opinion of M Caicedo Castilla).

⁷¹ Eg *SS Lotus* (n 31).

⁷² Pellet (n 15) 832.

termed as “an ultimate safeguard against the possibility of a *non liquet*”.⁷³ The “necessity” rationale was also acknowledged by some drafters of the PCIJ Statute.⁷⁴ In the field of human rights, Judge Tanaka, in his Dissenting Opinion in the *South West Africa* case, opined that “the concept of human rights and of their protection is included in the general principles mentioned in [Article 38(1)(c) of the ICJ Statute]”.⁷⁵ Stressing “there should be no legal vacuum in the protection of human rights”, Judge Tanaka considered that general principles of international law have a natural law character and fill the gaps in the protection offered by positive sources of law.⁷⁶ Also commenting on the gap-filling function of general principles of international law, Bassiouni has identified human rights as one of the four fields where general principles of international law play a particularly important role in response to the increased interdependence of the world and the need to adjudicate disputes involving human rights issues.⁷⁷

Secondly, among the five categories proposed by Schachter, certain categories of general principles of international law have been deemed as principles necessary for a) the co-existence of States and the operation of legal systems;⁷⁸ and b) the respect for “natural justice”.⁷⁹ The former category, principles necessary for the coexistence of States, mostly governs the rights and obligations of States. Examples of such principles include *pacta sunt servanda* and the equality of States. The latter category

⁷³ Hersch Lauterpacht, *The Development of International Law by the International Court* (CUP 1982) 166. See also Akiho Shibata, ‘The Court’s Decision in *Silentium* on the Sources of International Law: Its Enduring Significance’, in Karine Bannelier, Theodore Christakis, and Sarah Heathcote (eds), *The ICJ and the Evolution of International Law: The Enduring Impact of the Corfu Channel Case* (Routledge 2012) 203 (“the ‘last resort’ for the Court to avoid a *non-liquet*”).

⁷⁴ League of Nations, Advisory Committee of Jurists (n 62) 336.

⁷⁵ *South West Africa* (n 68) 298.

⁷⁶ *ibid* 298-99.

⁷⁷ Bassiouni (n 67) 769.

⁷⁸ Schachter, *International Law in Theory and Practice* (n 65) 53-54.

⁷⁹ *ibid*.

relates more to the protection of human rights and includes principles necessary to preserve the “minimal standards of decency and respect for the individual human being”.⁸⁰ Such principles reflect requirements imposed by natural law and apply to all States irrespective of their individual will or consent.⁸¹

C. Peremptory Norms

1. Criteria

Under general international law, there is a set of rules that represent overriding principles and cannot be set aside by treaties: peremptory norms, which are also known as *jus cogens*.⁸² Although much controversy arose within the UN ILC and among States during the drafting process,⁸³ Article 53 of the 1969 Vienna Convention on the Law of Treaties is often resorted to for a definition of the term:⁸⁴

[A] peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.⁸⁵

In its early cases, the ICJ avoided ruling on the identification and the effect of peremptory norms. For instance, in the *Nuclear Weapons Advisory*

⁸⁰ *ibid* 55.

⁸¹ Gerald Fitzmaurice, 'The Future of Public International Law and of the International Legal System in the Circumstances of Today' (1976) 5 *Intl Relations* 949, 982-83.

⁸² Brownlie, *Principles* (n 12) 510.

⁸³ Dinah Shelton, 'International Law and "Relative Normativity"' in Evans (ed) (n 1) 144.

⁸⁴ Eg Lauri Hennikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (Finnish Lawyers' Publishing Company 1988) 207-15; Stefan Kadelbach, 'Jus Cogens Obligations Erga Omnes and other Rules – The Identification of Fundamental Norm' in Christian Tomuschat and Jean-Marc Thouvenin (eds), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Martinus Nijhoff Publishers 2006) 28-29.

⁸⁵ Vienna Convention on the Law of Treaties (n 5) art 53.

Opinion, the ICJ described certain rules of international humanitarian law as rules “to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law”,⁸⁶ which leaves the question of whether these rules are in fact peremptory norms unanswered. Eventually in the 2006 *Armed Activities* case, the Court explicitly referred to the concept of peremptory norms and pronounced that the prohibition against genocide was one such norm.⁸⁷

The identification of peremptory norms is not an easy task, but it has been proposed that the defining feature of such norms is their legal consequences. In other words, peremptory norms are the rules categorised by treaties and State practice as absolute in nature.⁸⁸ The absolute character of peremptory norms is reflected in their unconditional application, regardless of any external factors, such as reciprocity, circumstances precluding wrongfulness under the law of State responsibility, or the attitude and motivation of the State in violation.⁸⁹ The ILC, when drafting the provision on peremptory norms in the 1969 Vienna Convention on the Law of Treaties, decided to not provide examples of such norms in order to avoid confusion regarding the status of norms not included in the list and to avoid prolonging the study of the law of treaties whilst preparing a proper list of examples.⁹⁰ Nevertheless, in its commentary to the draft provision on peremptory norms the ILC stipulated

⁸⁶ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para 79.

⁸⁷ *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)* [2006] ICJ Rep 6, 32.

⁸⁸ Kadelbach (n 84) 40.

⁸⁹ Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2006) 68-69.

⁹⁰ Yearbook of the International Law Commission, 1966, vol II (n 24) 248.

that the following examples had been suggested by its members: the prohibitions of the use of force, genocide, slave trading, and piracy.⁹¹

In the field of human rights, guarantees of non-derogable rights, such as those provided in Article 4(2) of the International Covenant on Civil and Political Rights,⁹² have been referred to as examples of peremptory norms.⁹³ The fact that the obligations pertaining to such rights cannot be suspended even during a state of emergency demonstrates their unconditional application. The relationship between non-derogable rights and peremptory norms is also discussed by the Human Rights Committee in its General Comment No 29. According to the Committee, some rights, such as those under Articles 11 and 18, are included in Article 4(2) simply because “it can never become necessary to derogate from these rights during a state of emergency”,⁹⁴ while the inclusion of a number of other rights, such as those under Articles 6 and 7, can be considered as recognition of their peremptory nature.⁹⁵

2. Basis of Authority

The authority of peremptory norms, which bind all States unconditionally irrespective of the will of the States and their attitudes towards it, cannot be explained by the theory of consent. For instance, Article 53 of the Vienna Convention on the Law of Treaties demonstrates that despite the consent of two or more States to be bound by a treaty, if such a treaty is

⁹¹ *ibid.*

⁹² Article 4(2) provides the list of rights that cannot be suspended even “in time of public emergency which threatens the life of the nation”. The rights include those protected under Articles 6, 7, 8(1)(2), 11, 15, 16 and 18 of the ICCPR.

⁹³ Kadelbach (n 84) 30; Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (CUP 2011) 326; Erika de Wet, ‘The Role of Human Rights in Limiting the Enforcement Power of the Security Council: A Principled View’ in Erika de Wet, André Nollkaemper, and Petra Dijkstra (eds), *Review of the Security Council by Member States* (Intersentia 2003) 22-23.

⁹⁴ UN Human Rights Committee, ‘General Comment No. 29’ in ‘Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies’ (27 May 2008) UN Doc HRI/GEN/1/Rev.9 (Vol. I) 237, para 11.

⁹⁵ *ibid.*

in conflict with peremptory norms, the latter prevails despite the States' consent. Rather, the absolute character of peremptory norms stems from the prevalence of the interests of the international community as a whole over that of individual States.⁹⁶ These norms are superior and retain the highest hierarchy due to the necessity of maintaining international public order. Such an argument finds support in scholarly writings, jurist opinion, and the work of the ILC on the law of treaties and the subsequent Vienna Conference on the Law of Treaties.

Firstly, in relation to the limits to freedom of States to enter into treaties, McNair commented that: "In every civilised community, there are some rules of law and some principles of morality which individuals are not permitted by law to ignore or to modify by their agreements".⁹⁷ At the international level, the "imperative provisions of the law or of public policy" are indispensable for an international legal order.⁹⁸ Such a view is also shared by other authors commenting on the basis of the binding force of peremptory norms.⁹⁹ Secondly, Judge Moreno-Quintana's separate opinion in the ICJ's *Guardianship of Infants* case emphasises the existence of certain "general principles of the law of nations and the fundamental rights of States, respect for which is indispensable to the legal coexistence of the political units which make up the international community", and these principles are usually peremptory in nature and universal in scope.¹⁰⁰ Lastly, the reports produced by two ILC Special Rapporteurs on the law of treaties, Lauterpacht and Waldock, suggest that Article 53 of the 1969 Vienna Convention on the Law of Treaties originated from the close

⁹⁶ Orakhelashvili (n 89) 67.

⁹⁷ Arnold D McNair, *The Law of Treaties* (2nd edn, OUP 1961) 213-14.

⁹⁸ Orakhelashvili (n 89) 28.

⁹⁹ Eg GJH van Hoof, *Rethinking the Sources of International Law* (Kluwer Law and Taxation 1983) 153-54.

¹⁰⁰ *Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v Sweden)* [1958] ICJ Rep 55, 106-07.

association between peremptory norms and the international legal order, as well as from the need to outlaw treaties with illegal objects.¹⁰¹ During the Vienna Conference on the Law of Treaties, various statements by State representatives echoed the same approach, suggesting that peremptory norms are derived from principles “absolutely essential to co-existence in the international community”¹⁰² and are rules “essential to the life of the international community”.¹⁰³

It can be argued that the authority and absolute nature of peremptory norms derives from the necessity in preserving the international legal order and the common interests of the international community. Although peremptory norms are not the only tool to maintain international public order, they embody rules and values that are so fundamental that any departure from them must not be admitted.¹⁰⁴ Therefore, from the point of view of the international community, there is a need to ensure such norms are upheld and no derogation is permitted.

Such a statement is also true when it comes to peremptory norms of human rights. For instance, in *Victims of the Tugboat ‘13 de Marzo’ v Cuba*, the Inter-American Commission on Human Rights stressed the peremptory nature of the right to life. When explaining the nature of peremptory norms, the Commission opined that these norms are rules accepted as “necessary to protect the public interest of the society of

¹⁰¹ Yearbook of the International Law Commission, 1953, vol II (1953) UN Doc A/CN.4/SER.A/1953/Add.1, 154-55 (Report by Lauterpacht); Yearbook of the International Law Commission, 1963, vol II (1963) UN Doc A/CN.4/SER.A/1963/Add.1, 52 (Report by Waldock).

¹⁰² ‘Summary Records of the Plenary Meetings and of the Meetings and of the Meetings of the Committee of the Whole’ UN Conference on the Law of Treaties, First Session (Vienna 26 March-24 May 1968) UN Doc A/CONF.39/11, 294 (Statement of Mr Suárez (Mexico) at the 52nd meeting of the Committee of the Whole).

¹⁰³ *ibid* 296 (Statement of Mr Yasseen (Iraq) at the 52nd meeting of the Committee of the Whole).

¹⁰⁴ Orakhelashvili (n 89) 28.

nations or to maintain levels of public morality recognized by them”.¹⁰⁵ In addition, writers such as Verdross and Brudner also emphasise that peremptory norms are considered absolute due to the common interest of the international community.¹⁰⁶ Furthermore, the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Furundžija Case* discussed the peremptory nature of the prohibition against torture. The Trial Chamber held that the peremptory norm prohibiting torture has an effect at both individual and international levels. At the individual level, torture involves criminal liability, and the peremptory characteristic of the prohibition leads to every State’s entitlement to investigate, prosecute, and punish those responsible.¹⁰⁷ At the international level, the peremptory nature of the prohibition “serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture”.¹⁰⁸ Further, the “deterrent effect”¹⁰⁹ created by such a prohibition also contributes to the common interest of the international community in the preservation of public morality recognised by all and the maintenance of a system where States and other actors peacefully co-exist. In sum, preserving international public order and the common good of the international community is crucial in maintaining a functioning international system where States and other actors peacefully coexist. In order to achieve this goal, according fundamental human rights norms with a special status that is not subject to derogation is necessary for safeguarding the interests of the international community as a whole.

¹⁰⁵ *Victims of the Tugboat ‘13 de Marzo’ v Cuba*, Inter-American Commission on Human Rights, Report No 47/96 (16 October 1996) para 79.

¹⁰⁶ Brudner (n 2) 249; Alfred Verdross, ‘*Jus Dispositivum* and *Jus Cogens* in International Law’ (1996) 60 Am J Intl L 55, 58-60. See also David F. Klein, ‘A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts’ (1988) 13 Yale J Intl L 332, 350-53.

¹⁰⁷ *Prosecutor v Furundžija* (Judgment) ICTY-95-17/1-T (10 December 1998) para 156.

¹⁰⁸ *ibid* para 155.

¹⁰⁹ *ibid* para 154.

III. The Applicability of General International Human Rights Law to Non-State Actors

In this Section, the categorisation of non-State actors follows that of Chapter 3. Yet, whilst NLMs are indeed of a special status in terms of the conclusion of international agreements, and therefore merit a distinct discussion on their treaty-making capacity, for the purposes of general international human rights law, they are often studied under the framework of insurgents and armed groups. Therefore, the present section will not address issues concerning NLMs independently.

Under general international human rights law, the roles of two other categories of non-State actors have also been the focus of scholarly writings: non-governmental organisations (NGOs) and transnational corporations. In terms of international law in general, NGOs undoubtedly play an increasingly important role in the law-making process,¹¹⁰ especially through participation in meetings of international institutions¹¹¹ and even through influence over the drafting of international legal instruments.¹¹² In the field of human rights law, the role played by NGOs in the law-making process has also been highlighted by various authors.¹¹³ Nevertheless, NGOs are usually not considered to be bearers of human rights obligations

¹¹⁰ Alan Boyle and Christine Chinkin, *The Making of International Law* (OUP 2007) 52-81.

¹¹¹ For example, NGOs with UN Economic and Social Council (ECOSOC) consultative status may sit as observers at public meetings of the ECOSOC and its subsidiary bodies and, upon invitation, attend international conference convened by the UN. UN ECOSOC 'Consultative Relationship between the United Nations and Non-Governmental Organizations' Res 1996/31 (25 July 1996) Principles 29 and 42.

¹¹² Kamminga provides a number of examples of instances where human rights NGOs have employed strategies to convince State representatives of the need to adopt treaties on certain particular topics. For instance, the International Commission of Jurists was instrumental behind the adoption of the African Charter on Human and People's Rights and the European Convention for the Prevention of Torture. Menno T Kamminga, 'The Evolving Status of NGOs under International Law: A Threat to the Inter-State System' in Philip Alston (ed), *Non-State Actors and Human Rights* (OUP 2005) 101-05.

¹¹³ Eg *ibid* 93-111; Isabelle R. Gunning, 'Modernizing Customary International Law: The Challenge of Human Rights' (1991) 31 *Virginia J Intl L* 211, 227-34; Andrea Bianchi, 'Globalization of Human Rights: The Role of Non-State Actors' in Gunther Teubner (ed), *Global Law without a State* (Dartmouth 1997) 185-92.

or violators of human rights and thus they are not included in the discussions in this Section.

Regarding transnational corporations, while there have been soft law instruments dealing with their human rights responsibilities,¹¹⁴ questions have been raised as to whether those instruments reflect the formation of customary international law, thus becoming “hard law”.¹¹⁵ Although it might be desirable to impose human rights obligations upon transnational corporations, the existing international legal framework does not seem to contain such binding obligations.¹¹⁶ Even in the UN Guiding Principles on Business and Human Rights, which were endorsed by the Human Rights Council in 2011, the responsibility of corporations is deemed as “a global standard of expected conduct for all business enterprises”¹¹⁷ rather than as “obligations”.¹¹⁸ In his report to the Human Rights Council, the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises clearly stated that respect for human rights is “not an obligation that current international human rights law generally imposes directly on companies”.¹¹⁹ This position has been since reiterated by the Working Group on the issue of human rights and transnational corporations and

¹¹⁴ Eg UN Human Rights Council, ‘Guiding Principles on Business and Human Rights’ in UN Human Rights Council, ‘Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises’ (21 March 2011) UN Doc A/HRC/17/31, Annex.

¹¹⁵ David Kinley and Junko Tadaki, ‘From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law’ (2004) 44 Virginia J Intl L 931, 952.

¹¹⁶ Gregory T Euteneier, ‘Towards a Corporate “Law of Nations”: Multinational Enterprises’ Contributions to Customary International Law’ (2007) 82 Tulane L Rev 757, 779. See also Kinley and Tadaki (n 115) 1021.

¹¹⁷ UN Human Rights Council, ‘Guiding Principles on Business and Human Rights’ (n 114) Commentary to Principle 11; UN Human Rights Council Res 17/4 (6 July 2011) UN Doc A/HRC/RES/17/4, para 1.

¹¹⁸ Rae Lindsay and others, ‘Human Rights Responsibilities in the Oil and Gas Sector: Applying the UN Guiding Principles’ (2013) 6 J World Energy L & Business 2, 11.

¹¹⁹ UN Human Rights Council, ‘Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises’ (9 April 2010) UN Doc A/HRC/14/27, para 55.

other business enterprises.¹²⁰ As the aim of this Section is to explore the applicability of general international human rights law to non-State actors, transnational corporations are not one of the actors considered in this Section.

Although there have been concerns regarding acknowledging the applicability of general international human rights law to non-State actors (mostly due to the fear of legitimising such actors), practice and writings introduced below demonstrate the tendency to acknowledge their obligations under general international human rights law.¹²¹

A. International Organisations

Considering that international organisations are established by States, the binding force of general international human rights law upon the former might stem from the basis that States cannot evade their obligations by acting in the name of an international organisation.¹²² While this may be the logical inference from the perspective of the formation of international organisations, in view of the diverse purposes, natures, functions, and structures of international organisations, every act of an international organisation cannot be considered as an act of all member States collectively and therefore governed by rules of general international human rights law binding upon States.¹²³ For instance, it has been argued that given the power and mandate provided by Chapter VII of the Charter of the UN to the Security Council, when the Security Council acts under this Chapter, it would not be bound by “obligations arising from treaties and

¹²⁰ ‘Report of the Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises’ (7 August 2013) UN Doc A/68/279, para 19.

¹²¹ Discussions of similar concerns in the context of international human rights treaties can be found in Chapter 3, Section B.

¹²² Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006) 109.

¹²³ See Eric De Brabandere, ‘Human Rights Accountability of International Administrations: Theory and Practice in East Timor’ in Jan Wouters and others (eds), *Accountability for Human Rights Violations by International Organisations* (Intersentia 2010) 338.

other sources of international law".¹²⁴ Further, it is generally agreed that the precise scope of international rights and obligations varies from one organisation to another.¹²⁵ Therefore, other bases need to be provided in order to determine whether and to what extent an international organisation is bound by general international human rights law.

With regard to the UN, Mégret and Hoffmann propose three possible foundations for the applicability of human rights standards;¹²⁶ two of which may be relevant to general international human rights law.¹²⁷ Firstly, they argue that the UN may be bound by such norms due to its status as a subject of international law.¹²⁸ This approach, termed "external conception", seems to find support in the opinion of Judge Fitzmaurice in the *Namibia Advisory Opinion* of the ICJ, which suggests that the Security Council is subject to well-established principles of international law as "the United Nations is itself a subject of international law".¹²⁹ The ICJ's *Interpretation of the Agreement of March 25, 1951 between the WHO and Egypt Advisory Opinion* provides a similar argument: "International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law".¹³⁰ Both opinions suggest that the UN is bound by rules generally

¹²⁴ Hans Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems, with Supplement* (London Institute of World Affairs 1964) 295.

¹²⁵ *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 178 (*Reparation Advisory Opinion*). See also Jan Wouters and others, 'Accountability for Human Rights Violations by International Organisations: Introductory Remarks' in Wouters and others (eds) (n 123) 7.

¹²⁶ Frédéric Mégret and Florian Hoffmann, 'The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities' (2003) 25 Human Rights Q 314, 316-18.

¹²⁷ The third foundation is the "hybrid" conception, according to which the human rights obligations of the UN may result from "functional treaty succession by international organisations to the position of their member States" (quoting August Reinisch, 'The Accountability of International Organizations' (2001) 7 Global Governance 131, 137). As this approach specifically refers to treaty obligations, it is beyond the scope of discussion in the present section.

¹²⁸ See also Wouters and others, 'Introductory Remarks' (n 125) 6-7.

¹²⁹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (Advisory Opinion) [1971] ICJ Rep 16, 294 (Dissenting Opinion of Judges Fitzmaurice).

¹³⁰ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) [1980] ICJ Rep 73, 89-90.

applicable to all subjects of international law. However, some writers consider that status as an international legal person is the consequence, not the basis, of the possession of rights and obligations.¹³¹ The notion of “legal persons”, or “subjects”, within a given legal system often entails that those entities have the capacity to enjoy rights and bear duties.¹³² The possession of legal personality has been considered by some as the threshold for an entity in a legal system to perform legal acts.¹³³ In contrast, a second school considers that if an entity has rights and duties, it has legal personality.¹³⁴ Moreover, it has been generally agreed that not all international legal persons possess the same capacities, rights, and obligations.¹³⁵ Thus, the first proposed basis, “external conception”, cannot satisfactorily explain why the international legal personality of international organisations automatically entails obligations under general international human rights law.

Mégret and Hoffmann’s second proposition is the “internal conception”, which emphasises that since the UN Charter includes the promotion of human rights as one of the organisation’s purposes, the UN is “obligated to pursue and try to realize its own purpose”.¹³⁶ A similar argument has been applied to the European Union (EU). As Article 6(3) of the Treaty on European Union stipulates that “[f]undamental rights, as guaranteed by the [European Convention on Human Rights] and as they result from the constitutional traditions common to the Member States, constitute general

¹³¹ MNS Sellers, ‘International Legal Personality’ (2005) 11 *Ius Gentium* 67, 74; Claudia Kissling, ‘The Legal Status of NGOs in International Governance and Its Relevance for the Legitimacy of International Organizations’ (2006) University of Bremen TranState Working Paper No 38, 7-8 <<http://econstor.eu/bitstream/10419/24951/1/514650192.PDF>> accessed 20 August 2014.

¹³² Shaw (n 1) 195.

¹³³ Jan Klabbers, ‘The Concept of Legal Personality’ (2005) 11 *Ius Gentium* 35, 49-56.

¹³⁴ Sellers (n 131) 74; Kissling (n 131) 7-8.

¹³⁵ D P O’Connell, *International Law*, vol 1 (2nd edn, Stevens & Sons Ltd 1970) 82.

¹³⁶ Zenon Stavrinides, ‘Human Rights Obligations under the United Nations Charter’ (1999) 3 *Intl J Human Rights* 38, 40.

principles of the Union's law",¹³⁷ some have argued that such a provision creates binding obligations for EU organs.¹³⁸ However, it is unclear why such a pronouncement in the constituent instrument of an international organisation is sufficient to create binding obligations for the organisation as a matter of general international law. While the "internal conception" does not fully justify the applicability of general international human rights law to the UN, the "axiomatic approach" proposed by Clapham might serve to supplement this argument. Clapham's approach places emphasis on the repeated practice at various levels within the UN affirming that UN personnel should protect and respect human rights.¹³⁹ In other words, it is not only the constituent instrument, but also the subsequent practice carried out within the framework of the instrument that serve as evidence of the organisation's unilateral declaration to be bound by human rights standards and thus create binding international legal obligations.¹⁴⁰ Also, as the UN consistently calls for the respect of human rights norms by States and other actors, it should acknowledge the applicability of such norms to its own activities.¹⁴¹ This of course does not lead to the conclusion that all international organisations are bound by general international human rights law. The use of the UN as an example here demonstrates the theories concerning international organisations in this

¹³⁷ Treaty on European Union (Maastricht Treaty) art 6(3). See also *Nold v Commission* [1974] ECR 491, 507.

¹³⁸ Lars Bordo Krogsgaard, 'Fundamental Rights in the European Community After Maastricht' (1993) 1 *Legal Issues of European Integration* 99, 108.

¹³⁹ Clapham, *Human Rights Obligations* (n 122) 127.

¹⁴⁰ Under international law, unilateral declarations made by States can sometimes be considered to create binding legal obligations. (*Nuclear Tests (Australia v France)* [1974] ICJ Rep 253, para 43.) While the legal effect of unilateral declarations by non-State actors remains unclear, the ILC appears to have endorsed the linkage between the capacity of States to issue unilateral declarations creating binding legal obligations and their treaty-making capacity. Based on the ILC's rationale (ILC, 'Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, with Commentaries thereto' Yearbook of the International Law Commission, 2006, vol II(2) (2006) UN Doc A/CN.4/SER.A/2006/Add.1 (Part 2) 371), if a subject of international law, such as an international organization, possesses the capacity to enter into treaty relations and profess its intention to be bound through means of bilateral or multilateral agreements, it can do so through unilateral declarations.

¹⁴¹ Reinisch (n 127) 137.

regard and, just as the case of the UN, the nature, purposes and functions of an international organisation determine the organisation's possession of obligations under general international human rights law and the extent of such obligations.

B. Armed Groups¹⁴²

Traditionally, in terms of armed groups recognised as insurgents or belligerents, the possession and extent of rights and obligations of such groups was determined in accordance with the recognition they received from the relevant States.¹⁴³ Yet, under modern rules of international law, once the situation warrants the application of humanitarian law, non-State armed groups who are parties to the conflict are bound, as a matter of international law, by relevant rules of human rights and humanitarian norms, irrespective of their international legal status and whether the parties acknowledge the existence of an armed conflict.¹⁴⁴ Tomuschat has suggested that, the grounds for applying international humanitarian law to non-State parties to an armed conflict can be adduced to support the applicability of international human rights law.¹⁴⁵ Individuals, instead of abstract warring parties, are the ones most adversely affected by the armed conflicts. Therefore, the paramount humanitarian consideration requires obedience to international human rights and humanitarian law by all parties. Moreover, in situations of non-international armed conflicts, governments and the opposition armed groups may in fact share many

¹⁴² The terms "armed groups", "non-State armed groups", and "non-State parties [to an armed conflict]" are used interchangeably here.

¹⁴³ Clapham, *Human Rights Obligations* (n 122) 271.

¹⁴⁴ See eg Institute of International Law, 'Resolution "The Application of International Humanitarian Law and Fundamental Human Rights, in Armed Conflicts in Which Non-State Entities are Parties"' (25 August 1999) para II <http://www.idi-iil.org/idiE/resolutionsE/1999_ber_03_en.PDF> accessed 20 August 2014.

¹⁴⁵ Christian Tomuschat, 'The Applicability of Human Rights Law to Insurgent Movements' in Horst Fischer and others (eds), *Crisis Management and Humanitarian Protection* (BWV - Berliner Wissenschafts-Verlag 2004) 576.

similar characteristics and should thus be subject to similar standards. For instance, the Guatemalan Commission on Historical Clarification applied principles common to international human rights and humanitarian law to both the guerrilla forces and the Guatemalan government “with a view to giving equal treatment to the Parties”.¹⁴⁶

In terms of the responses of various UN organs to conflict situations involving non-State armed groups, practice has seen condemnation of violations of both human rights and humanitarian law by States and non-State warring parties, as well as calls for respect for or compliance with both bodies of norms. For instance, in its first resolution on the topic of protection of civilians in armed conflict, the Security Council “[u]rge[d] all parties concerned to comply strictly with their obligations under international humanitarian, human rights and refugee law”.¹⁴⁷ Similar statements regarding human rights and humanitarian law can also be seen in Security Council resolutions 1564 (Sudan),¹⁴⁸ 1814 (Somalia),¹⁴⁹ and 1894 (protection of civilians).¹⁵⁰ Various resolutions adopted by the former UN Commission on Human Rights and the current Human Rights Council also adopt similar approaches.¹⁵¹ The fact that many of these resolutions adopt terminology such as “calls upon” or “urges” might be interpreted as political statements rather than legal pronouncements. Yet Tomuschat points out that although decisions taken by the Security Council under

¹⁴⁶ *ibid* (citing Informe de la Comisión para el Esclarecimiento Histórico, Guatemala Memoria del Silencio, vol I, Guatemala (1999) 46). A similar reference to the Guatemalan Commission’s report can be found in *Tomás Lares Cipreano v Guatemala* (Merits) Inter-American Commission on Human Rights, Report No 69/106 (21 October 2006) n 19.

¹⁴⁷ UNSC Res 1265 (17 September 1999) UN Doc S/RES/1265, para 4.

¹⁴⁸ Security Council Resolution 1564, UN Doc S/RES/1564 (1999). (The Security Council “[s]tress[ed] that the Sudanese rebel groups, particularly the Justice and Equality Movement and the Sudanese Liberation Army/Movement, must also take all necessary steps to respect international humanitarian and human rights law”.)

¹⁴⁹ UNSC Res 1814 (15 May 2008) UN Doc S/RES/1814, para 16. (The Security Council “[c]ondemn[ed] all and any violations of human rights and international humanitarian law, calls upon all parties in Somalia to respectfully their obligations in this regard ...”.)

¹⁵⁰ UNSC Res 1894 (11 November 2009) UN Doc S/RES/1894, para 1. (The Security Council “[d]emand[ed] that parties to armed conflict comply strictly with the obligations applicable to them under international humanitarian, human rights and refugee law”.)

¹⁵¹ Eg UNCHR Res S-3/1 (25 May 1994) UN Doc E/CN.4/RES/S-3/1, para 1.

Article 39 of the UN Charter usually adopt mandatory terminology, for instance “decides”, since the abovementioned resolutions are meant to draw attention to the existing international legal order, not to create new obligations, it is unnecessary to adopt mandatory language.¹⁵²

The applicability of human rights norms to non-State armed groups is further explored by UN special procedure mandate holders. When introducing the international legal framework governing the use of lethal force by the government of Sri Lanka and the LTTE, the Special Rapporteur on extrajudicial, summary or arbitrary executions wrote: “As a non-State actor, the LTTE ... remains subject to the demand of the international community, first expressed in the Universal Declaration of Human Rights, that every organ of society respect and promote human rights”.¹⁵³ The same Special Rapporteur in an earlier report identified activities of armed groups that “exercise significant control over territory and population and have an identifiable political structure” as desirable targets to be addressed “within some part of the human rights equation”.¹⁵⁴ The abovementioned arguments were later applied in the report by four mandate holders following their joint mission to Lebanon and Israel in 2006. They called on Hezbollah, a non-State armed group, to respect human rights norms.¹⁵⁵ In a relatively recent publication by the UN Office of the High Commissioner for Human Rights, the element of control over territory and population was

¹⁵² Tomuschat (n 145) 585-86.

¹⁵³ UNCHR, ‘Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Mission to Sri Lanka’ (27 March 2006) UN Doc E/CN.4/2006/53/Add.5, para 25.

¹⁵⁴ UNCHR, ‘Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions’ (22 December 2004) UN Doc E/CN.4/2005/7, para 76.

¹⁵⁵ UN Human Rights Council, ‘Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, the Representative of the Secretary-General on Human Rights of Internally Displaced Persons, and the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living: Mission to Lebanon and Israel’ (2 October 2006) UN Doc A/HRC/2/7, para 19.

again emphasised as a relevant factor in determining the application of human rights norms to non-State actors involving in armed conflicts.¹⁵⁶

Lastly in the context of the UN, commissions of inquiry and fact-finding missions established to investigate and report on serious violations of human rights and humanitarian law also contribute to affirming the human rights obligations of non-State armed groups. Such findings can be observed in the reports of the commissions of inquiry on, for instance, Sudan, Libya,¹⁵⁷ and Syria.¹⁵⁸ In particular, in the report submitted by the International Commission of Inquiry on Darfur, the Commission established that the two rebel groups, the Sudan Liberation Movement/Army and the Justice and Equality Movement “have reached a certain threshold of organization, stability and effective control of territory, possess international legal personality and are therefore bound by the relevant rules of customary international law on internal armed conflicts”,¹⁵⁹ and these rules include “fundamental human rights principles with regard to internal armed conflicts”.¹⁶⁰ Also, the International Commission of Inquiry established to investigate the alleged human rights violations in Libya reported that “it is increasingly accepted that where non-state groups exercise de facto control over territory, they must respect fundamental human rights of persons in that territory”.¹⁶¹ In this connection it has been argued that if a rebel group seeks to become the legitimate government of

¹⁵⁶ UN OHCHR, ‘International Legal Protection of Human Rights in Armed Conflict’ (2011) UN Sales No E.11.XIV.3, 25.

¹⁵⁷ UN Human Rights Council, ‘Report of the International Commission of Inquiry to Investigate All Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya’ (1 June 2011) UN Doc A/HRC/17/44, para 72.

¹⁵⁸ UN Human Rights Council, ‘Report of the Independent International Commission of Inquiry on the Syrian Arab Republic’ (5 February 2013) UN Doc A/HRC/22/59, paras 64, 177; UN Human Rights Council ‘Report of the Independent International Commission of Inquiry on the Syrian Arab Republic’ (4 June 2013) UN Doc A/HRC/23/58, paras 57, 160, 167.

¹⁵⁹ ‘Report of the International Commission of Inquiry on Darfur, Pursuant to Security Council Resolution 1564 of 18 September 2004’ (25 January 2005) para 172 <http://www.un.org/news/dh/sudan/com_inq_darfur.pdf> accessed 20 August 2014.

¹⁶⁰ *ibid* para 165.

¹⁶¹ UN Human Rights Council, ‘Report of the International Commission of Inquiry on Libya’ (n 157) para 72.

the territory concerned, there is a requirement of the international community that such groups respect the rules and obligations applicable to all States “in the interest of a civilized state of affairs among nations”.¹⁶²

As demonstrated above, the discussions regarding the human rights obligations of non-State armed groups often relate to situations of armed conflicts. While there is no doubt that the rules governing armed conflicts overlap with certain fundamental human rights norms, whether non-State armed groups are bound by general international human rights norms, independently from the application of international humanitarian norms, remains to be explored. In this regard, the two following opinions are of relevance.

The ICTY in the *Čelebići* case specified the relevance of human rights law in the context of an armed conflict by elaborating on the nature of the rules codified in Common Article 3. The Appeals Chamber of the ICTY reaffirmed the customary status of rules in Common Article 3, reiterated their applicability to both international and non-international armed conflicts, and opined that both human rights and humanitarian law share “concern for human dignity, which forms the basis of a list of fundamental minimum standards of humanity”.¹⁶³ It held that in relation to human rights law, non-derogable rights are of particular significance when determining the scope of fundamental standards “applicable at all times, in all circumstances and to all parties”.¹⁶⁴ This reasoning suggests that rules of general international human rights law forming minimum standards of humanity are binding upon non-State parties to an armed conflict.

¹⁶² Tomuschat (n 145) 587.

¹⁶³ *Prosecutor v Mucić et al* (Judgment) ICTY-96-21-A (20 February 2001) paras 143, 147-49.

¹⁶⁴ *ibid* para 149.

Also, the Institute of International Law, in its resolution on the application of international humanitarian law and fundamental human rights in armed conflicts in which non-State entities are parties, has stated that the law applicable to such conflicts include “the principles of international law ‘derived from established custom, from the principles of humanity and from dictates of public conscience’”.¹⁶⁵ Even in situations not amounting to an armed conflict, such as internal disturbances, the Institute has adopted the position that “[a]ll parties are bound to respect fundamental human rights under the scrutiny of the international community”.¹⁶⁶ Such a position suggests that fundamental human rights norms apply to non-State armed groups outside the framework of international humanitarian norms. It has even been argued that “a customary rule has emerged that extends human rights obligations to [armed opposition groups] in control of territory”.¹⁶⁷

C. Entities Created to Administer Territories

Entities established for the purpose of administering or supervising certain territories are often created under the auspices of international organisations,¹⁶⁸ whose obligations under general international human rights law need to be ascertained in light of their nature, purpose and activities.¹⁶⁹ It has been argued that where an international organisation creates entities that undertake functions originally performed by the government of a State, the exercise of public authority and administrative

¹⁶⁵ Institute of International Law (n 144) para IV.

¹⁶⁶ Eg *ibid* para X.

¹⁶⁷ Aristotle Constantinides, ‘Human Rights Obligations and Accountability of Armed Opposition Groups: The Practice of the UN Security Council’ (2010) 4 Human Rights & Intl Legal Discourse 89, 102-03.

¹⁶⁸ Lissitzyn (n 70) 7.

¹⁶⁹ Carla Bongiorno, ‘A Culture of Impunity: Applying International Human Rights Law to the United Nations in East Timor’ (2002) 33 Columbia Human Rights L Rev 623, 643-44.

activities under such circumstances should be bound by general international human rights law.¹⁷⁰

With regards to the actual practice, Regulation 1999/01 of the UN Transitional Authority in East Timor states that “[i]n exercising their functions, all persons undertaking public duties or holding public office in East Timor shall observe internationally recognized human rights standards”, especially those reflected in the Universal Declaration on Human Rights and core international human rights treaties.¹⁷¹ While the practice of the United Nations Interim Administration Mission in Kosovo (UNMIK), on the other hand, suggests that treaty obligations binding upon Serbia were not considered by UNMIK as automatically applicable to it,¹⁷² it has been argued that such a view does not deny the applicability of customary human rights law.¹⁷³ Alternatively, it has been proposed that since officials working for an entity created to administer a territory are acting as “agents” of the State to whom the territory belongs to, rules applicable to States must therefore be complied with by that entity.¹⁷⁴

IV. The Applicability of General International Human Rights Law to Unrecognised Entities

As demonstrated in the discussion in the previous sections, the application of general international human rights law is no longer limited to States. Practice acknowledging the applicability of general international human rights law to unrecognised entities can also be found. This Section

¹⁷⁰ De Brabandere (n 123) 338.

¹⁷¹ Regulation 1999/1 on the Authority of the Transitional Administration in East Timor, UN Doc UNTAET/REG/1991/1 (27 November 1999) Section 2.

¹⁷² Report Submitted by the United Nations Interim Administration Mission in Kosovo to the Human Rights Committee on the Human Rights Situation in Kosovo Since June 1999, UN Doc CCOR/C/UNK/1 (13 March 2006) paras 123-24.

¹⁷³ De Brabandere (n 123) 339.

¹⁷⁴ Ralph Wilde, ‘The Complex Role of the Legal Adviser When International Organizations Administer Territory’ (2001) 95 Am Soc’y Intl L Proceedings 251, 256.

introduces some further examples of such practice and then seeks to provide a theoretical basis to justify why unrecognised entities should be bound by general international human rights law.

A. Practice Acknowledging the Applicability of General International Human Rights Law to Unrecognised Entities

Practice at the national and international levels has seen acknowledgement of general human rights obligations in the case of certain unrecognised entities. In 1995, two citizens of Bosnia-Herzegovina alleged to be victims of human rights violations by the military forces of the self-proclaimed Republic of Srpska, led by Karadžić, brought their claims before US courts. As the case was brought under the Alien Tort Claims Act, the issue of whether the Republic of Srpska was a State emerged. The District Court considered that since the military faction that carried out the human rights atrocities in question “[did] not constitute a recognised State”, and the acts committed by non-State actors “[did] not violate the law of nations”, they “[could not] be remedied through [the Alien Tort Claims Act].¹⁷⁵ However, the US Court of Appeals Second Circuit took a different view. It was argued that, despite the lack of recognition, the Republic of Srpska in fact fulfilled the definition of State, with control over defined territory and populations within its power and conclusions of agreements with other governments. The Court considered that it would be anomalous if non-recognition “had the perverse effect of shielding officials of the unrecognized regime from liability for those violations of international law norms that apply only to state actors” and found that “[t]he customary international law of human rights ... applies to states without distinction

¹⁷⁵ *Doe v Karadžić*, 866 F Supp. 734, 739-41 (SDNY 1994).

between recognized and unrecognized states".¹⁷⁶ Such a conclusion supports the argument that, the Republic of Srpska, although not recognised as a State, was in fact bound by customary international human rights law.

At the international level, a number of reports or statements issued by various human rights mandate holders of the UN touch upon the issue of the applicability of general international human rights law to certain unrecognised entities. While some merely adopt the language of human rights in their reports, others explicitly adopt terminology suggesting binding obligations. In terms of the former, the view taken by the Special Rapporteur on extrajudicial, summary or arbitrary executions regarding the LTTE in Sri Lanka can serve as an example. In addition to being an armed group, the LTTE also at one point fulfilled the criteria of unrecognised entities provided in Chapter 2,¹⁷⁷ and the Special Rapporteur opined that the LTTE "remain[ed] subject to the demand of the international community ... that every organ of society respect and promote human rights"¹⁷⁸ and are desirable targets to be addressed "within some part of the human rights equation".¹⁷⁹

Other reports have chosen to employ strong language implying obligations. For instance, in 2005, the Special Rapporteurs on the right to health and on the right to adequate housing received information concerning the imminent eviction of residents in a sanatorium for leprosy patients in Taiwan. In their statement urging respect for human rights of individuals affected by leprosy, they "remind[ed] the authorities of their obligations

¹⁷⁶ *Kadić v Karadžić*, 70 F3d 232, 245 (2d Cir 1995).

¹⁷⁷ For a discussion on the criteria of unrecognised entities in the context of the LTTE, see Chapter 2, Section III.B.

¹⁷⁸ UNCHR, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Mission to Sri Lanka' (n 153) para 25.

¹⁷⁹ UNCHR, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions' (n 154) para 76.

under international human rights law".¹⁸⁰ In a more recent report on the LTTE, the UN Secretary-General's Panel of Experts on Accountability in Sri Lanka commented that

although non-state actors cannot formally become party to a human rights treaty, it is now increasingly accepted that non-state groups exercising *de facto* control over a party of a State's territory must respect fundamental human rights of persons in that territory. Various organs of the United Nations, including the Security Council, have repeatedly demanded that such actors respect human rights law. Although the Panel recognizes that there remains some difference of views on the subject among international actors, it proceeds on the assumption that, at a minimum, the LTTE was bound to respect the most basic human rights of the person, and freedom from torture and cruel, inhuman or degrading treatment and punishment.¹⁸¹

More recently in 2012, the Senior Expert on Human Rights in Transnistria undertook three missions to the region. Transnistria is a region in the Republic of Moldova that is controlled by *de facto* authorities but not considered by the international community to be an independent State. In his report after his missions, the UN expert wrote that the *de facto* authorities governing the Transnistrian Region, although not recognised as

¹⁸⁰ UN OHCHR, 'UN Experts Express Concern over Imminent Eviction of Taiwanese Residents in Lo-Sheng Sanatorium' (20 July 2005) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=3329&LangID=E>> accessed 20 August 2014.

¹⁸¹ 'Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka' (31 March 2011) para 188 <http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf> accessed 20 August 2014.

a State, should be bound by “customary international law obligating [them] to uphold the most fundamental human rights norms”.¹⁸²

As the abovementioned practice suggests that unrecognised entities may be bound by general international human rights law, the discussion below aims to provide a theoretical basis for this practice by drawing upon the discussions in previous sections on the nature and authority of general international human rights law and on the applicability of general international human rights law to non-State actors.

B. Basis of the Applicability of General International Human Rights Law to Unrecognised Entities: Necessity

As introduced in the previous chapter, the notion of necessity, or the “needs of the international community”,¹⁸³ was invoked by the ICJ in its 1949 *Reparation Advisory Opinion* to determine the nature, capacities, rights, and obligations of a subject of international law.¹⁸⁴ The discussion below goes on to invoke the notion of necessity to explain why unrecognised entities should be bound by general international human rights law, while making reference to the bases of obligations of various non-State actors introduced in the previous section.

The necessity of holding unrecognised entities bound by general international human rights law can be established on two grounds: a) the bases of authority of different sources of general international law; b) the common characteristics shared by unrecognised entities and States, taking into consideration the nature of obligations under general international

¹⁸² ‘Report on Human Rights in the Transnistrian Region of the Republic of Moldova by Thomas Hammarberg, Senior Expert’ (14 February 2013) 4 <<http://www.un.md/publicdocget/41/>> accessed 20 August 2014.

¹⁸³ For discussions concerning the notion of the “international community” and the question of who determines the “needs of the international community”, see Chapter 3, Section III.A.1.a.

¹⁸⁴ *Reparation Advisory Opinion* (n 125) 176.

human rights law. Section II introduced theories explaining the bases of binding force of international custom, general principles of international law and peremptory norms. Although the will of States appears to play a role in the formation of these rules, with the element of acceptance or recognition by States being a part of their definitions, the theory of State consent does not seem to provide a satisfactory justification for their binding force. Instead, the authority of general international law might derive from the necessity to uphold the basic standards of justice and decency, pursue common interests, and maintain a peaceful international community. While the traditional State-centred approach considers the will of States as the basis of international obligation, the necessity approach focuses on the needs of the international community and opens the possibility of expanding the application of general international law to non-State actors. Of course not all non-State actors would accordingly be bound by general international law, but as demonstrated below, it is indeed necessary, from the point of view of the international society, to impose general international human rights obligations on unrecognised entities.

Recalling the discussions in Section III, as international human rights obligations were traditionally associated with States, their application to non-State actors often is based on the actors' resemblance to States. The influence of the statist tradition can be observed particularly in the discussions concerning non-State armed groups and entities created to administer territories. The fact that a non-State armed group displays State-like characteristics (exercising territorial control and possessing political organisation) is often invoked as the basis for the imposition of

obligations under general international human rights law.¹⁸⁵ In the case of entities created to administer territories, the applicability of general international human rights law rests on the entities' performance of functions traditionally carried out by States or on the argument that these entities are in fact acting as agents of the State to which the territory in question belongs.¹⁸⁶ Turning to unrecognised entities, as the fulfilment of traditional criteria of statehood is proposed by this thesis as one of the required characteristics of unrecognised entities, such entities by definition share common traits with States. A similar thesis was put forward by Groth in relation to private military security firms, arguing that the firms performing activities that are "inherently governmental" should bear obligations under international human rights law.¹⁸⁷ In short, in situations where the State is no longer the entity in control of the territory or exercising governmental functions, the obligations originally assumed by States should be transferred to the entity that is best placed to offer human rights protection. Such transferral is necessary to avoid gaps of protection merely due to changes in political circumstances or governing authorities. From the point of view of individuals, their rights should be protected no matter whether the entity governing the territory and population is a State, a non-State armed group, an international territorial administration, or an unrecognised entity.

Further, it is necessary to impose general international human rights obligations to unrecognised entities in view of the nature of such

¹⁸⁵ See Section III.B of the present chapter.

¹⁸⁶ See Section III.C of the present chapter.

¹⁸⁷ Lauren Groth, 'Transforming Accountability: A Proposal for Reconsidering How Human Rights Obligations Are Applied to Private Military Security Firms' (2012) 35 *Hastings Intl & Comp L Rev* 29, 70-71. The term "inherently governmental" is a concept under domestic law of the United States and refers to "a function that is so intimately related to the public interest as to require performance by Federal Government employees".

obligations. Similar to conventional human rights obligations,¹⁸⁸ obligations under general international human rights law share the same typology: respect, protect, and fulfil.¹⁸⁹ Firstly, the duty to respect obliges States to refrain from violations of human rights. Secondly, the duty to protect demands that States exercise due diligence in order to prevent individuals from being subjected to human rights violations committed by private actors, and take appropriate measures to respond to violations, including through investigation and punishment. Lastly, the duty to fulfil requires States to structure their governmental apparatus and perform functions with an aim to contributing to the greater enjoyment of rights. Therefore, governmental institutions and bodies must formulate a national system in order to carry out these different categories of duties.¹⁹⁰ Although discussions surrounding the tripartite typology often take place in the context of human rights treaties,¹⁹¹ this does not mean that such a typology only applies to treaty obligations. When the typology was first proposed by Shue¹⁹² and later developed by Eide,¹⁹³ distinctions were not made between conventional and general obligations. Notably, in Eide's analysis, although references were made to the two human rights Covenants, he also acknowledged that the rights embedded in the Universal Declaration of Human Rights were recognised by some as

¹⁸⁸ See Chapter 3, Section III.A.1.

¹⁸⁹ Writers discussing this typology often refer to international human rights law in general, rather than international human rights treaties specifically. Eg Ida Elisabeth Koch, 'Dichotomies, Trichotomies or Waves of Duties' (2005) 5 Human Rights L Rev 81, 82.

¹⁹⁰ Jean-Bernard Marie, 'National Systems for the Protection of Human Rights' in Janusz Symonides (ed), *Human Rights: International Protection, Monitoring, Enforcement* (Ashgate 2004) 258.

¹⁹¹ Eg UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 12' in in 'Compilation of General Comments' (n 94) para 15; *Velásquez-Rodríguez v Honduras* (Judgment) Inter-American Court of Human Rights Series C No 4 (29 July 1988) paras 172, 174-77.

¹⁹² Henry Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy* (2nd edn, Princeton UP 1996) 52. He termed the three categories of duties as: duties to avoid depriving, to protect from deprivation and to aid the deprived.

¹⁹³ Asbjørn Eide, 'The International Human Rights System' in Asbjørn Eide and others (eds), *Food as a Human Rights* (UN Univ 1984) 154; UNCHR, 'Report on the Right to Adequate Food as a Human Right: Final Report Submitted by Asbjørn Eide, Special Rapporteur' (7 July 1987) UN Doc E/CN.4/Sub.2/1987/23, paras 66-69.

forming a part of customary international law and thus as rights under international law.¹⁹⁴ This suggests that the typology may be applicable equally to customary human rights obligations.

The necessity of imposing upon unrecognised entities the duties to respect, protect and fulfil under general international human rights law is evident especially in light of the exclusive control exercised by unrecognised entities over territory and population. Since it is the unrecognised entity that exercises control and possesses the governmental structures and institutions to administer the territory, it is the most, if not the only, appropriate entity to carry out all three categories of duties.

Also, by definition, unrecognised entities must possess *de facto* independence. In other words, an unrecognised entity is not subjected to foreign control in its decisions and actions, and thus generally, no other State can be held directly or indirectly responsible for the conduct of an unrecognised entity. Therefore, in order to ensure individuals living in the territory of an unrecognised entity enjoy rights under general international human rights law, it is necessary to impose corresponding obligations to such an entity.

Lastly, even though the previous chapter argues that unrecognised entities should be granted the capacity to conclude or participate in international human rights treaties, that does not eliminate the necessity of allowing such entities to bear obligations under general international human rights law. On the one hand, many unrecognised entities have not expressed consent to be bound by international human rights treaties or have only consented to be bound by a number of them. The application of general

¹⁹⁴ UNCHR, 'Report on the Right to Adequate Food as a Human Right' (n 193) para 62.

international human rights law to these entities is therefore essential in ensuring human rights protection in the territories controlled by unrecognised entities. On the other hand, even if an unrecognised entity expresses its consent to be bound by all existing international human rights treaties, general international human rights law serves to fill the gaps of the treaty system. As Sinclair wrote, “customary law itself, operating alongside the codifying convention, has its role to play in filling the gaps which any exercise in codification and progressive development inevitably leaves”.¹⁹⁵ A similar function of general principles of international law (in situations where there is an absence of rules under conventional and customary law) was pointed out earlier. In short, it remains necessary that general international human rights law is applicable to unrecognised entities to ensure its universal application to even territories not subject to *de facto* control by any State.

C. Potential Concerns for Acknowledging the Applicability of General International Human Rights Law to Unrecognised Entities

As discussed in the previous chapter, States might be reluctant to acknowledge the treaty-making capacity of unrecognised entities due to a number of concerns,¹⁹⁶ and some of those concerns might also be asserted in the context of the applicability of general international human rights law to unrecognised entities. Firstly, there is the concern of improperly legitimising unrecognised entities.¹⁹⁷ Such a concern stems from the fear that, the acknowledgment of the capacity to bear international obligations implies the acknowledgment of certain legitimacy or status under international law. Although such a concern theoretically

¹⁹⁵ Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester UP 1984) 258.

¹⁹⁶ See Chapter 3, Section III.B.

¹⁹⁷ This was introduced by Clapham as a possible argument against imposing international obligations to non-State actors, but he later dismissed the argument. Clapham, *Human Rights Obligations* (n 122) 46-53.

stands, as demonstrated by the examples in practice to be discussed above, it appears that the fear of legitimisation is outweighed by the need to safeguard human rights by imposing human rights obligations on unrecognised entities.

Another concern emerges if unrecognised entities are not only considered bound by general international human rights law but also are able to engage in the law-making process. It might be argued that allowing unrecognised entities to play a role in the law-making process would risk downgrading standards of human rights protection.¹⁹⁸ Though such a risk might theoretically exist, there is little evidence to suggest that unrecognised entities necessarily lack the capacity or willingness to provide human rights protection and would therefore support the downgrading of standards. On the contrary, it can be argued that unrecognised entities, especially those seeking recognition or approval from the international community, might have stronger incentives to align themselves with existing international human rights standards. Although the role that unrecognised entities can play in the law-making process remains unclear, the examples introduced above suggest that the risk of downgrading standards of protection, if any, has not barred the acknowledgement of the applicability of general international human rights law to unrecognised entities.

V. Conclusion

¹⁹⁸ This concern has been raised in the context of involving armed groups in the law-making process of international humanitarian law. Anthea Roberts and Sandesh Sivakumaran, 'Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law' (2012) 37 Yale J Intl L 107, 137-38 (eventually finding that the disadvantages of incorporating armed groups in the law-making process can be countered by adjusting the manner of their participation, instead of excluding them altogether).

In order to examine the applicability of general international human rights law to unrecognised entities, this chapter first looked at the various sources of general international human rights law and the basis of their authority. While the will and consent of States has traditionally been considered as an important basis of obligations of States under international law, especially considering that almost all sources of general international law include the element of acceptance by States in their criteria, it is undeniable that certain rules are binding irrespective of State consent or withdrawal of consent. This is particularly evident in the continuing binding force of international custom on States who object to those rules after the rules have obtained customary status and in the absolute and unconditional applicability of peremptory norms. Such characteristics indicate that, in addition to States consent, there are other considerations justifying the authority of general international human rights law. This thesis proposes that the notion of necessity is in fact the underlying consideration. For the peaceful co-existence of States and the maintenance of order in the international community, certain rules need to remain applicable.

The relation of the notion of necessity to the binding force of general international human rights law becomes all the more evident when the human rights obligations of non-State actors are examined. Taking the examples of international organisations, non-State armed groups, and entities created to administer territories, it has been demonstrated that the tradition of holding States to be the sole duty bearers under general international human rights law is no longer sustainable. Rather, the applicability of general international human rights law has been expanded to actors taking on functions of States and/or exercising effective control over territories and populations, because such expansion of scope of

application is necessary to ensure the protection of human rights in areas where States cannot control.

Turning to unrecognised entities, considering that they have fulfilled the traditional criteria of statehood and achieved *de facto* independence, it naturally follows that no other State is in the position to carry out obligations under general international human rights law in the territories of these entities. In order to guarantee that the rights of individuals in those territories are respected, ensured and protected and to uphold the principle of universality of human rights, it is necessary to impose obligations of general international human rights law on the unrecognised entities. The arguments presented in this chapter and those developed in relation to international human rights treaties in Chapter 3 will be considered in the context of the ROC (Taiwan) in the next chapter.

CHAPTER 5

THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW TO THE ROC (TAIWAN)

I. Introduction

The preceding chapters explored the nature and characteristics of unrecognised entities and the applicability of international human rights law to those entities. This chapter in turn applies the theories and arguments put forward in the preceding chapters to the ROC (Taiwan). The ROC was established in 1912, but as a result of a civil war between the ROC and the Chinese Communist Party that began in 1927 and continued intermittently until 1949, the ROC lost control of the Chinese mainland, which formed the majority of the territory of the ROC. The Chinese Communist Party established the PRC in 1949, and since then the ROC and the PRC governments have been battling for recognition at the international level. As a founding member of the UN, the ROC participated in various aspects of the operation of the organisation, including its human rights-related work. However, after the adoption of UN General Assembly Resolution 2758 in 1971, which recognised the representatives of the PRC government as the lawful representatives of China at the UN, the ROC was barred from participating in the UN and its specialised agencies, and gradually lost support from other States, who were under pressure from the PRC to de-recognise the ROC government.

After the de-recognition of the ROC government, its previous signatures and ratifications of human rights treaties were no longer recognised. Moreover, its attempts to participate in international human rights treaties, including the CEDAW, the ICCPR, and the ICESCR, in recent years have been denied. As will be demonstrated in subsequent sections of this

chapter, the enjoyment of human rights in Taiwan receives little attention from UN bodies tasked with functions related to human rights. Outside the UN, among the international actors who most often comment on issues of human rights in Taiwan is the European Union (EU). Even though the EU appears to support the “adoption of the provisions of the ICCPR and ICESCR in Taiwan’s domestic law”, it has not expressed its position specifically on Taiwan’s attempt to participate in international human rights treaties.¹ Overall, the human rights situation in the ROC is rarely addressed in any international forum. Essentially, academic writings² and reports produced by non-governmental organisations (NGOs)³ have become the only forms of human rights monitoring.⁴

Taiwan’s international legal status and its interaction with the international human rights regime trigger many questions in relation to the application of international human rights law to Taiwan: whether the ROC government’s signatures and ratifications of international human rights treaties prior to its de-recognition remain valid; whether the ROC is now eligible to be a party to international human rights treaties; whether the ROC bears obligations under general international human rights law, etc. To answer these questions, this chapter first explores the historical background contributing to the special status of the ROC and applies the

¹ European Union - European External Action Service, ‘The European Union and Death Penalty in Taiwan’ <http://eeas.europa.eu/delegations/taiwan/eu_taiwan/human_rights/abolition_death_penalty/index_en.htm> accessed 20 August 2014.

² For examples of such academic writings in English, see Jyh-pin Fa, ‘The Development of Human Rights in the Republic of China: 1971-1981’ (1981) 1 Chinese YB Intl L & Affairs 125; Jyh-pin Fa, ‘Legislation and Constitutional Interpretations on Human Rights in the Republic of China, 1982-1983: An Overview’ (1983) 3 Chinese YB Intl L & Affairs 87; Fort Fu-Te Liao, ‘The Abolition of the Death Penalty in Taiwan: Why a De Facto Moratorium Was Established and Lost’ (2010) 1 Asia-Pacific J Human Rights & L 1.

³ Amnesty International, for instance, includes a section on Taiwan (separate from the section on China) in its annual reports on human rights in the world. For the most recent report, see Amnesty International, ‘Annual Report 2013: The State of the World’s Human Rights: Taiwan’ <<http://www.amnesty.org/en/region/taiwan/report-2013>> accessed 20 August 2014.

⁴ Additionally, the Department of State of the United States also include a section on Taiwan in its annual Country Reports on Human Rights Practices. For its latest report on Taiwan, see US Department of State, ‘Taiwan 2013 Human Rights Report’ <<http://www.state.gov/documents/organization/220444.pdf>> accessed 20 August 2014.

definition of an unrecognised entity to Taiwan (Section II). Section III introduces the participation of, and attempts to participate by, the ROC government in international human rights treaties before and after its de-recognition, and then discusses whether such treaties should be applicable to Taiwan, based on the arguments put forward in Chapter 3 of the thesis. Section IV moves on to examine the practice of and concerning Taiwan in relation to general international human rights law, and then discuss the applicability of such law to Taiwan in light of the arguments set out in Chapter 4.

II. The International Legal Status of the ROC (Taiwan)

Discussions on the legal status of Taiwan often involve two sets of questions: a) the legal status of the islands of Taiwan and Penghu, which are currently under the control of the ROC government; and b) whether the ROC is a State or should be recognised as one. In keeping with the focus of the research, the following discussion will focus on the latter.⁵ Firstly, the historical background that contributes to Taiwan's current disputed status will be introduced and Taiwan's international legal status will be examined in light of the theories provided in Chapter 2.

A. Historical Background

The ROC, established in 1912, emerged in the aftermath of a revolution that overthrew the Qing Dynasty the year before. At the time of its establishment, the islands of Formosa (Taiwan) and Pescadores (Penghu) were ceded to Japan under the 1895 Treaty of Shimonoseki. Japanese rule

⁵ For discussions on the legal status of the islands currently controlled by the ROC government, see eg D P O'Connell, 'The Status of Formosa and the Chinese Recognition Problem' (1956) 50 AJIL 405; J P Jain, 'Legal Status of Formosa: A Study of British, Chinese and Indian Views' (1963) 57 AJIL 25; Hans Kuijper, 'Is Taiwan a Part of China?' in Jean-Marie Henckaerts (ed), *The International Status of Taiwan in the New World Order: Legal and Political Considerations* (Kluwer Law Intl 1996) 9.

over the islands continued until the end of the Second World War.⁶ In the 1943 Cairo Declaration, the Allies declared that “all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa and the Pescadores, shall be restored to the Republic of China”.⁷ The 1945 Potsdam Proclamation later affirmed the terms of the Cairo Declaration.⁸ Yet the 1951 San Francisco Peace Treaty with Japan only stated that Japan “renounces all right, title and claim to Formosa [Taiwan] and the Pescadores [Penghu]”,⁹ without specifying to whom the islands should be returned. Thus some have argued that such a provision created ambiguity and left the legal status of these islands “undetermined”, and that “Taiwan was legally detached from Japan but was not attached to China or any other country”.¹⁰ However, in the Instrument of Surrender of 1945, Japan indeed undertook to carry out the provisions of the Potsdam Proclamation and eventually surrendered to the Commander-in-Chief of the ROC.¹¹ On the Chinese mainland, not long after the establishment of the ROC, a civil war broke out between the forces of the Nationalist government of the ROC and the Communist Party in 1927. Though interrupted by the Sino-Japanese War that started in 1937, the civil war resumed soon after the end of the Second World War. In 1949, the defeated ROC forces retreated to the island of Taiwan, and the Communist Party of China, led by Mao Tse Tung, established the PRC.

⁶ For a brief account of history of Taiwan since the seventeenth century, see Yu-ming Shaw, ‘Modern History of Taiwan: An Interpretative Account’ in Hungdah Chiu (ed), *China and the Taiwan Issue* (Praeger 1979).

⁷ Cairo Declaration (1 December 1943) in *Foreign Relations of the United States: Diplomatic Papers, The Conferences at Cairo and Tehran, 1943* (US Government Printing Office 1961) 448.

⁸ Potsdam Proclamation (Proclamation Calling for the Surrender of Japan, Approved by the Heads of Governments of the United States, China, and the United Kingdom) (26 July, 1945) in *Foreign Relations of the United States: Diplomatic Papers, The Conference of Berlin, 1945 (The Potsdam Conference)*, vol II (US Government Printing Office 1960) 1475, para 8.

⁹ Treaty of Peace with Japan (adopted 8 September 1951, entered into force 28 April 1952) 136 UNTS 45 art 2(b).

¹⁰ Lung-chu Chen, ‘Taiwan’s Current International Legal Status’ (1998) 32 *New England L Rev* 675, 677.

¹¹ James Crawford, *The Creation of States in International Law* (2nd edn, OUP 2006) 198.

The ROC was one of the founding members of the UN, and the UN Charter in fact contains explicit references to the "Republic of China". Article 23 provides that "[t]he Security Council shall consist of eleven Members of the United Nations, The Republic of China, ... shall be permanent members of the Security Council", ¹² and Article 110(3) states that "[t]he present Charter shall come into force upon the deposit of ratifications by the Republic of China ... and by a majority of other signatory States".¹³ Yet, after the establishment of the PRC, governments of both the ROC and the PRC claimed to be the sole representative of China and have since engaged in a diplomatic battle, fighting for recognition from other States as well as the representation in international organisations, including the UN.¹⁴ While during the first two decades after the establishment of the PRC, the ROC was recognised by most States and represented China in the UN and other international organisations, by the mid-1970s, the PRC had garnered recognition from a majority of States.¹⁵ The crucial turning point came in 1971, when the UN General Assembly adopted Resolution 2758, "recognizing that the representatives of the Government of the People's Republic of China are the only lawful representatives of China to the United Nations and that the People's Republic of China is one of the five permanent members of the Security Council".¹⁶ The Resolution further decided to "restore all its rights to the People's Republic of China ... and to expel forthwith the representatives of Chiang Kai-Shek [then-President of the ROC] from the place which they unlawfully occupy at the United

¹² Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art 23.

¹³ *ibid* art 110(3).

¹⁴ Many have written on the developments since the Second World War and the relations between the ROC and PRC. Eg Jonathan I Charney and J R V Prescott, 'Resolving Cross-Strait Relations between China and Taiwan' (2000) 94 AJIL 453; Chi Chung, 'International Law and the Extra-Ordinary Interaction between the People's Republic of China and the Republic of China on Taiwan' (2009) 19 Indiana Intl & Comp L Rev 233.

¹⁵ Crawford, *The Creation of States* (n 11) 199.

¹⁶ UNGA Res 2758 (XXVI) (25 October 1971) UN Doc A/RES/2758(XXVI).

Nations and in all the organizations related to it".¹⁷ Following the adoption of this resolution, the ROC not only was barred from participating in the UN and its specialised agencies, but also gradually lost support from other States, who were under pressure from the PRC to "de-recognise" the ROC government.¹⁸ Despite such pressure, as a matter of fact, Taiwan has not been governed by the PRC, and the status of the ROC needs to be ascertained in light of the relevant theories introduced in Chapter 2.

B. The International Legal Status of the ROC (Taiwan)

Applying the traditional criteria of statehood, there is little doubt that the ROC (Taiwan) objectively meets all the criteria.¹⁹ Firstly, concerning the requirement of a permanent population, as of June 2014, it is estimated that a population of 23.392 million is under the ROC's effective governance.²⁰ Secondly, regarding the criteria of a defined territory, the ROC's rule extends to the islands of Taiwan, Penghu, Kinmen, Matsu, and other surrounding small islands, covering an area of more than 36,000 square kilometres.²¹ Although the sovereignty over certain surrounding islands remains disputed,²² this does not defeat the claim that the ROC has fulfilled the requirement of defined territory. The competing claim by the PRC also does not change the fact that the ROC indeed exercises effective control²³ over the area.²⁴ Thirdly, with regard to the requirement of

¹⁷ *ibid.*

¹⁸ Cheri Attix, 'Between the Devil and the Deep Blue Sea: Are Taiwan's Trading Partners Implying Recognition of Taiwanese Statehood?' (1995) 25 *California Western Intl LJ* 357, 363-64.

¹⁹ Vaughan Lowe, *International Law* (OUP 2007) 165; Richard K Gardiner, *International Law* (Longman 2003) 199.

²⁰ National Statistics (ROC), 'Monthly Statistics: 02-01 General Condition of Population' <http://eng.stat.gov.tw/public/data/dgbas03/bs7/bulletin_eng/B-1.xls> accessed 20 August 2014.

²¹ Executive Yuan (ROC), 'ROC Yearbook: Geography & Demographics' <<http://www.ey.gov.tw/en/cp.aspx?n=5776024635D354A6>> accessed 4 July 2014.

²² See eg Han-yi Shaw, 'Revisiting the Diaoyutai/Senkaku Islands Dispute: Examining Legal Claims and New Historical Evidence under International Law and the Traditional East Asian World Order Principle' (2008) 26 *Chinese (Taiwan) YB Intl L & Affairs* 95.

²³ The discussion concerning the notion of effective control can be found in Chapter 2, Section III.

government, after Japan's colonisation ended in 1945, the ROC has since assumed exclusive control over the abovementioned territory and established an effective government with an executive, legislative and judicial branch.²⁵ Lastly, pertaining to the criteria of capacity to enter into relations with other States, as of July 2014, the ROC maintains formal diplomatic relations with 22 States²⁶ and holds membership or observership in approximately 50 inter-governmental organisations.²⁷ In addition, the ROC has concluded numerous agreements with other States.²⁸ Yet in many cases, such agreements do not refer to either the ROC or Taiwan as a party. A number of agreements on economic cooperation are concluded by the "Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu" (the ROC's name as a member of the World Trade Organization),²⁹ while many agreements are concluded between governmental organs³⁰ or representative offices (which serve as *de facto* embassies and consulates)³¹ of the ROC and another State. Even though

²⁴ Donald G Palmer, Jr, 'Taiwan: *De Jure* or Not *De Jure*? That is the Question. An Analysis of Taiwan's Legal Status within the International Community' (1996) 7 JFK U L Rev 65, 86.

²⁵ Huang-Chih Chiang and Jau-Yuan Hwang, 'On the Statehood of Taiwan: A Legal Reappraisal' in Peter C Y Chow (ed), *The "One China" Dilemma* (Palgrave Macmillan 2008) 70.

²⁶ Ministry of Foreign Affairs (ROC), 'Country with Whom We Currently Have Diplomatic Relations' <<http://www.mofa.gov.tw/en/AlliesIndex.aspx>> accessed 20 August 2014.

²⁷ Ministry of Foreign Affairs (ROC), 'IGOs in Which We Participate' <<http://www.mofa.gov.tw/enigo/Link3enigo.aspx?n=58BD38F4400A7167>> accessed 20 August 2014.

²⁸ Each volume of the Chinese (Taiwan) Yearbook of International Law and Affairs provides a chronological list of "treaties/agreements and official, semi-official or unofficial agreements concluded by the Republic of China with other countries" in the respective year, as well as selected text. The Ministry of Foreign Affairs of the ROC also maintains a database of such agreements. Ministry of Foreign Affairs (ROC), 'Treaty and Agreement Collection Inquiry System' <<http://no06.mofa.gov.tw/mofatreatys/IndexE.aspx>> accessed 20 August 2014.

²⁹ For instance, in 2013, the ROC concluded two such agreements with New Zealand (Agreement between the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu and New Zealand on Economic Cooperation) and Singapore (Agreement between Singapore and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu on Economic Partnership).

³⁰ For instance, in 2011, the ROC concluded such agreements with Italy (Memorandum of Understanding on Operational Cooperation between the Customs Service of Taiwan and the Italian Customs Agency), Mongolia (Memorandum of Understanding between the National Immigration Agency of the Ministry of the Interior of the Republic of China and the Mongolia Immigration Agency the Ministry of Justice and Home Affairs of Mongolia concerning Cooperation in Immigration Affairs and Human Trafficking Prevention), and Slovakia (Agreement between the Ministry of Finance of the Republic of China (Taiwan) and the Ministry of Finance of the Slovak Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income), among others.

³¹ For instance, in 2010, the ROC concluded such agreements with Australia (Memorandum of Understanding between the Taipei Economic and Cultural Office in Australia and the Australian Commerce and Industry Office in Taipei on Cooperation within the Fields of Energy

different names have been used, these agreements serve as evidence that many States retain semi-official or unofficial trade, political and cultural relations with the ROC.³² It can be observed that the ROC's capacity to enter into relations with other States has seldom been called into question.³³

Besides the traditional criteria of statehood, the ROC has also proven itself to be compatible with many of the proposed additional requirements.³⁴ For instance, regarding the requirement of willingness and ability to observe international law, the ROC, even after its expulsion in 1971, has continued to support the activities and resolutions of the UN. For instance, after Iraq's invasion of Kuwait in 1990, the UN Security Council adopted Resolution 661 imposing economic sanctions against Iraq, and the ROC government subsequently issued an order to implement this resolution by suspending the issuance of export licenses to Iraq.³⁵ Another example can be observed in the ROC government's response following the adoption of Security Council Resolution 1973 in 2011 regarding the no-fly zone over Libya, voicing its intention to respect the resolution.³⁶ The ROC's attempts

and Minerals), the United States (Agreement between the Taipei Economic and Cultural Representative Office in the United States and the American Institute in Taiwan for Cooperation in and the Promotion of Transportation Safety), and Vietnam (Agreement between the Taipei Economic and Cultural Office in Vietnam and the Vietnam Economic and Cultural Office in Taipei on Judicial Assistance in Civil Matters), among others.

³² Angeline G Chen, 'Taiwan's International Personality: Crossing the River by Feeling the Stones' (1998) 20 Loyola LA Intl & Comp LJ 223, 225. For instance, after the United States severed its diplomatic relation with the ROC, the Taiwan Relations Act was enacted to continue the "commercial, cultural and other relations between the people of the United States and the people on Taiwan". Taiwan Relations Act of 1979, Pub L No 96-8, 22 USC § 3301 (a).

³³ Brad R Roth, 'The Entity That Dare not Speak Its Name: Unrecognized Taiwan as a Right-Bearer in the International Legal Order' (2009) 4 East Asia L Rev 91, 98. See also Hsiu-An Anne Hsiao, 'On the Fringe of Statehood – Para-Statal Actors in International Law' (PhD thesis, London School of Economics and Political Science, University of London 2003) 128-30.

³⁴ See Christopher J. Carolan, 'The "Republic of Taiwan": A Legal-Historical Justification for a Taiwanese Declaration of Independence' (2000) 75 NYU L Rev 429, 455-57; Parris Chang and Kok-ui Lim, 'Taiwan's Case for United Nations Membership' (1997) 1 UCLA J Intl L & Foreign Affairs 393, 422-23.

³⁵ Similar actions were taken in response to Resolutions 757, 788, and 820, which imposed sanction against Yugoslavia. Hungdah Chiu, 'The Right of the Republic of China and Its 21 Million Chinese People to Participate in the United Nations' (1995) 28 J Marshall L Rev 247, 253-54.

³⁶ Ministry of Foreign Affairs (ROC), 'The Republic of China (Taiwan) to Respect UN Resolution on No-Fly Zone over Libya' (21 March 2013) <http://www.mofa.gov.tw/En/News_Content.

to participate in the CEDAW,³⁷ the ICCPR, and the ICESCR,³⁸ as well as the subsequent incorporation of these instruments into domestic law, also demonstrate the ROC's willingness to promote and protect human rights in its territory.

Regarding another additional criterion, independence, it has been argued that since the ROC has never made a claim of separate statehood from China, and that no State (even including the ROC itself³⁹) regards the ROC as a State independent of the PRC, it is not *de jure* independent, and it should not be recognised as a State.⁴⁰ This position has also led some to conclude that the additional requirement of *independence* is not fulfilled in the case of Taiwan. However, in view of recent developments, the validity of this argument may be questioned.

After the establishment of the PRC, the ROC government did hold the position that it represented the whole of China, even though it only effectively controlled Taiwan, Penghu, Kinmen, Matsu, and other surrounding small islands. Nevertheless, the ROC government since the 1980s has gradually ceased to claim to be the sole legitimate representation of China, and a formal statement was made in 1994 that "the ROC government would no longer compete for the right to represent China in the international arena".⁴¹ In 2007, the ROC government formally

aspx?n=1EADDCFD4C6EC567&sms=5B9044CF1188EE23&s=55DDF2BD12069953> accessed 20 August 2014.

³⁷ Ministry of Foreign Affairs (ROC), 'Ministry of Foreign Affairs Proactively Promotes Taiwan's Participation in the "Convention on the Elimination of All Forms of Discrimination against Women"' (30 April 2007) <http://www.mofa.gov.tw/en/News_Content.aspx?n=1EADDCFD4C6EC567&sms=5B9044CF1188EE23&s=1BDBF9DEE247D7CE> accessed 20 August 2014.

³⁸ Office of the President (ROC), 'President Ma Signs Instruments of Ratification of Two Covenants on Human Rights' (14 May 2009) <<http://english.president.gov.tw/Default.aspx?tabid=491&itemid=19415>> accessed 20 August 2014.

³⁹ This claim might derive from the traditional position of the ROC government that it was the sole legitimate government of China.

⁴⁰ Crawford, *The Creation of States* (n 11) 219; Malcolm N Shaw, *International Law* (6th edn, CUP 2008) 234. See also Gardiner (n 19) 199-200.

⁴¹ Chiang and Hwang (n 25) 60.

submitted an application for UN membership under the name of Taiwan.⁴² The recent attempt to participate in international human rights treaties (whose membership is limited to States) can also serve as evidence that the ROC, at least implicitly, considers itself and claims to be a State. This tendency can be observed even in situations involving the PRC. In November 2012, the PRC revealed a new design of passport, which included photographs of the ROC's territory and landscape. In response, the Mainland Affairs Council released a statement stressing that:

Mainland China's inclusion of photographs of Taiwan's territory and landscape entirely ignores existing facts and provokes controversy... The ROC is a sovereign and independent country. Under the ROC Constitution, the ROC's territory has its existing national boundaries. The mainland Chinese authorities should squarely face the fact that the two sides are divided by the sea and governed separately...⁴³

Another example can be observed in the ROC's response after the PRC announced the establishment of an "air-defence identification zone" in the East China Sea, which covers disputed islands claimed by the ROC, the PRC, and Japan, in November 2013. Following the PRC's announcement, the ROC National Security Council issued a statement reiterating the ROC "sovereignty" over the islands, "a fact which is not affected in any way by mainland China's announcement concerning an air defense identification

⁴² United Nations, 'Request for the Inclusion of a Supplementary Item in the Agenda of the Sixty- Second Session: Urging the Security Council to Process Taiwan's Membership Application Pursuant to Rules 59 and 60 of the Provisional Rules of Procedure of the Security Council and Article 4 of the Charter of the United Nations' (17 August 2007) UN Doc A/62/193. However, it is important to note that the language of the application was smartly drafted to avoid being interpreted as a declaration of independence.

⁴³ Mainland Affairs Council (ROC), 'MAC Issues a Stern Statement on the Mainland's New Passport' (23 November 2014) <<http://www.mac.gov.tw/ct.asp?xItem=103648&ctNode=6256&mp=3>> accessed 20 August 2014.

zone”.⁴⁴ Therefore, while it remains true that the ROC has not officially characterised its relations with the PRC as inter-State relations, it has on a few occasions emphasised its status as a “sovereign State”.

Despite the developments mentioned above, the official position of the ROC government still denies the seeking of independence, leaving room for the argument that the ROC has not achieved formal independence. Furthermore, since the current administration came into power after the Presidential Election of 2008, the government has been campaigning for closer ties with Mainland China, and the likelihood of formally claiming independence seems to have diminished.⁴⁵ In summary, the ROC remains a peculiar case under international law, and whether the ROC should be recognised as a State is still open to debate.

C. Applying the Definition of an Unrecognised Entity to the ROC (Taiwan)

As defined in Chapter 2, an unrecognised entity is an entity that fulfils the traditional criteria of statehood, or the “Montevideo criteria”, and achieves *de facto* independence but is not generally recognised as a State by the international community. Applying the traditional criteria of statehood, as discussed above, there is little doubt that Taiwan meets all the criteria.⁴⁶ Regarding the second element of the definition, *de facto* independence, an unrecognised entity must exercise a certain degree of control over its territory, and its actions and decisions cannot be that of another State.⁴⁷

⁴⁴ National Security Council (ROC), ‘ROC Statement on Beijing’s Announcement of the East China Sea Air Defense Identification Zone’ (24 November 2013) <<http://www.mofa.gov.tw/en/cp.aspx?n=FB12FE5EEF086E38>> accessed 20 August 2014; Ministry of Foreign Affairs (ROC), ‘ROC Responds to Beijing’s Announcement of East China Sea Air Defense Identification Zone’ (24 November 2013) <http://www.mofa.gov.tw/en/News_Content.aspx?n=8157691CA2AA32F8&sms=4F8ED5441E33EA7B&s=CFACC05ABB27BC1A> accessed 20 August 2014.

⁴⁵ Lori F Damrosch and others, *International Law: Cases and Materials* (5th edn, West Academic Publishing 2009) 343.

⁴⁶ Lowe (n 19) 165; Gardiner (n 19) 199.

⁴⁷ Crawford, *The Creation of States* (n 11) 72; David Raič, *Statehood and the Law of Self-Determination* (Kluwer Law Intl 2002) 78.

In other words, if an entity is subject to the “effective control” of another State, then it would not be considered as *de facto* independent. Taiwan is often referred to as an example of an entity with *de facto*, but not *de jure*, independence (since it has never made the claim of independent statehood from the PRC).⁴⁸ Although Taiwan retains official or semi-official relations with many States, none of them in fact exercises effective control over Taiwan. As for the PRC, in recent years, interactions between the two sides of the Taiwan Strait have increased, especially since 2008, and cooperation has been negotiated regarding various issues, such as transportation, trade, investment, and crime-fighting.⁴⁹ While the PRC is admittedly an influential actor from Taiwan’s point of view, the Taiwanese government nevertheless does not act “on the instructions of, or under the direction or control of”⁵⁰ the PRC, and thus the criterion of *de facto* independence is met. Lastly, with regards to the element of lacking general recognition, despite the relations that Taiwan maintains with other States, the majority of the international community do not recognise Taiwan as a State, and instead considers Taiwan to be a part of the PRC.⁵¹ In conclusion, Taiwan fits the definition of an unrecognised entity, and the subsequent discussions apply the arguments regarding the application of international human rights law to unrecognised entities, as developed in Chapters 3 and 4, to Taiwan.

III. The Application of International Human Rights Treaties to the ROC (Taiwan)

⁴⁸ Raič (n 47) 76. See also Thomas D Grant, ‘Defining Statehood: The Montevideo Convention and Its Discontents’ 37 (1999) Columbia J Transnatl L 403, 439.

⁴⁹ For information regarding the cross-strait negotiations and the agreements concluded therefrom, see Mainland Affairs Council (ROC), ‘Dialogue and Negotiation’ <<http://www.mac.gov.tw/np.asp?ctNode=5891&mp=3>> accessed 20 August 2014.

⁵⁰ ILC, ‘Articles on Responsibility of States for Internationally Wrongful Acts’, UNGA Res 56/83 (12 December 2011) UN Doc A/RES/56/83, Annex (ILC Articles on State Responsibility) art 8.

⁵¹ Attix (n 18) 363-64.

A. The ROC (Taiwan) and International Human Rights Treaties

1. Before the De-Recognition of the ROC Government

As a founding member of the UN, the ROC actively participated in the drafting of the UN Charter and the three instruments collectively known as the International Bill of Human Rights: the Universal Declaration on Human Rights (UDHR), the ICCPR, and the ICESCR.⁵² Although many consider that part or even all of the UDHR carries binding force,⁵³ it is nevertheless not a treaty. Therefore, the ROC's role in its drafting will be included in the discussions below concerning general international human rights law (Section IV.A.1.).

After the Second World War, as the major powers of the world gathered to discuss the establishment of a general international organisation, which would ultimately become the UN, the ROC was one of the few States that advocated the inclusion of principles related to human rights in the constituent instrument of the organisation.⁵⁴ Wellington Koo, who led the ROC's delegation at the Dumbarton Oaks Conference, spoke about law and justice⁵⁵ and stated that:

The new organization aims at the maintenance of peace and security throughout the world. ... As a means of promoting this ... it will be highly desirable to consecrate the principle of equality of races as of states in the fundamental instrument of the new institution. Reference to this principle ... in the

⁵² Ian Neary, *Human Rights in Japan, South Korea and Taiwan* (Routledge 2002) 116.

⁵³ Hurst Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1995/96) 25 Georgia J Intl & Comp L 287, 324 (citing scholars such as Patrick Thornberry, Philip Alston, AH Robertson, JG Merrills, opining that the UDHR has become customary international law).

⁵⁴ Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen* (3rd edn, U Pennsylvania P 2011) 160.

⁵⁵ Robert C Hilderbrand, *Dumbarton Oaks: The Origins of the United Nations and the Search for Postwar Security* (U North Carolina P 1990) 237.

preamble of the new charter will not only give moral satisfaction to the greater part of humanity, but will also go far to pave the way for the realization of the ideal of universal brotherhood inseparable from the ideal of permanent world peace.⁵⁶

Yet, this view was not shared by other participants of the Conference, and in the proposals adopted at the end of the Conference only one “perfunctory reference” was incorporated:⁵⁷ “the Organization should ... promote respect for human rights and fundamental freedoms”.⁵⁸

Turning to the drafting of the two Covenants, originally, it was envisaged that the UN Commission on Human Rights would prepare a text for a single Covenant on Human Rights rather than the two separate instruments that exist today. The ROC’s contribution to drafting appears to be limited to the period before the decision was taken to draft two instruments. For instance, the ROC submitted amendments to draft texts (for instance, on draft Article 18, freedom of assembly⁵⁹) and a proposal on the implementation of the Covenant. In the proposal on implementation jointly issued by the ROC and the US, it was suggested that complaints under the Covenant should be resolved in the first place by negotiation, and failing that, by referral to the Committee established under the Covenant.⁶⁰ The proposal also suggested that there was no need to

⁵⁶ Lauren (n 54) 162.

⁵⁷ William A Schabas, *The Universal Declaration of Human Rights: The Travaux Préparatoires*, vol 1 (CUP 2013) lxxv.

⁵⁸ Proposals for the Establishment of a General International Organization, Washington Conversations on International Peace and Security Organization (7 October 1944) Ch IX, Sec A.

⁵⁹ UNCHR, ‘Draft International Covenant on Human Rights, Article 18, China: Drafting Amendment’ (9 June 1949) UN Doc E/CN.4/307.

⁶⁰ UNCHR, ‘China and the United States: Proposal on Implementation for the Covenant on Human Rights’ (16 June 1948) UN Doc E/CN.4/145.

establish an International Court of Human Rights or a dedicated special chamber in the International Court of Justice.⁶¹

In addition to UN instruments, the ROC also participated in the drafting of a number of International Labour Organization (ILO) conventions dealing with the right to work and labour rights. For instance, in the discussions in June 1957 leading to the adoption of the Abolition of Forced Labour Convention, representatives of both the ROC government and the workers in the ROC presented statements. The ROC representative expressed the government's support for the adoption of such a Convention, noted the practice of forced labour in the PRC-controlled mainland China, and concluded the issue of forced labour not only related to human rights but also security.⁶² After the ILO Convention No 105 (Abolition of Forced Labour Convention) was adopted on 25 June 1957, the ROC officially ratified the instrument in 1959.

Aside from contributing to the process of drafting, the ROC also expressed its intention to participate in a number of human rights instruments. In total, before 1971, the ROC signed, ratified, or acceded to over 30 treaties related to human rights.⁶³ These include: the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention on the Political Rights of Women, the ICERD, the ICCPR; the (First) Optional

⁶¹ *ibid.*

⁶² International Labour Conference (40th Session) Record of Proceedings (1957) (statement by Mr Tsune-chi Yu (China) at the 22nd Sitting, 21 June 1957) 355-57.

⁶³ Ministry of Foreign Affairs (ROC), Wai Jiao Bu Han: Wai Tiao Yi Zi Di 9101164450 Hao [Ministry of Foreign Affairs Letter, Ref. No.: Wai-Tiao-Yi-Zi-9101164450], cited in Taiwan New Century Foundation, 'Guo Ji Ren Quan Gong Yue Guo Nei Fa Hua Zhi Fang Fa Yu Ce Lue [Means and Strategies of Domesticating International Human Rights Treaties]' Report No RDEC-RES-091-003, Commissioned by the Research, Development and Evaluation Commission, Executive Yuan (2002) 102-04.

Protocol to the ICCPR, and the ICESCR. A full list is set out in Table 1 below.⁶⁴

When the ROC signed or ratified these instruments, the UN at times received communications from certain States protesting against the signatures/ratifications. For instance with respect to the ICERD, Bulgaria, Mongolia, the Byelorussian Soviet Socialist Republic, the Ukrainian Soviet Socialist Republic, and the Union of Soviet Socialist Republics notified the UN that the ROC's signature and/or ratification were null and void since the "since the so-called 'Government of China' had no right to speak or assume obligations on behalf of China, there being only one Chinese State, the People's Republic of China, and one Government entitled to represent it, the Government of the People's Republic of China".⁶⁵ Similar communications were sent from these States and three additional ones (Czechoslovakia, Romania, and Yugoslavia) following the ROC's signatures of the ICCPR and the ICESCR.⁶⁶ In response to these communications, the ROC stated in letters to the Secretary-General that,

the Republic of China, a sovereign State and Member of the United Nations, had attended the twentieth regular session of the United Nations General Assembly, contributed to the formulation of the Convention concerned, signed the Convention and duly deposited the instrument of ratification thereof, and that "any statements and reservations relating to

⁶⁴ See pages 207-10.

⁶⁵ UNTC, 'Chapter IV Human Rights: 2. International Convention on the Elimination of All Forms of Racial Discrimination' <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en> accessed 20 August 2014.

⁶⁶ UNTC, 'Chapter IV Human Rights: 3. International Covenant on Economic, Social and Cultural Rights' <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en> accessed 20 August 2014; UNTC, 'Chapter IV Human Rights: 4. International Covenant on Civil and Political Rights' <http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en> accessed 20 August 2014.

the above-mentioned Convention that are incompatible with or derogatory to the legitimate position of the Government of the Republic of China shall in no way affect the rights and obligations of the Republic of China under this Convention".⁶⁷

However, after the adoption of UN General Assembly Resolution 2758, the validity of the signatures, ratifications, and accessions by the ROC became disputed.

2. After the De-Recognition of the ROC Government

General Assembly Resolution 2758 marked the ROC's exit from the UN,⁶⁸ and the ROC was subsequently excluded from participating in the UN specialised agencies to which the ROC held membership, such as the ILO and UNESCO. This was followed by the de-recognition and breaking of diplomatic ties by the majority of States in the world. The ROC became isolated from the international community. Furthermore, domestically, in the midst of the civil war between the nationalist and communist governments, martial law was imposed in Taiwan in May 1949.⁶⁹ The imposition of martial law continued even after the ROC retreated from mainland China and only ended on 15 July 1987.⁷⁰ Although the ROC Constitution contains provisions on the protection of fundamental human rights, the martial law effectively suspended those provisions. For instance, Article 11 of the Martial Law authorised the government to restrict the enjoyment of freedoms of assembly and association, among other rights, and regulations were subsequently adopted to further enforce the

⁶⁷ UNTC, 'Chapter IV Human Rights: 2. International Convention on the Elimination of All Forms of Racial Discrimination' (n 65).

⁶⁸ See text accompanying nn 16, 17.

⁶⁹ Tai Wan Jie Yan Ling [Order of Martial Law in Taiwan] (ROC) (1949) <<http://www.archives.gov.tw/Publish.aspx?cnid=1014&p=857>> accessed 20 August 2014.

⁷⁰ Tai Wan Di Qu Jie Yan Ling [Order Terminating Martial Law] (ROC) (1987) <<http://law.moj.gov.tw/LawClass/LawAll.aspx?PCode=A0000016>> accessed 20 August 2014.

restriction, such as by prohibiting the establishment of new political parties.⁷¹ These external and internal factors contributed to the ROC's lack of interaction with the international human rights regime during that time.⁷²

On 29 September 1972, the PRC sent a communication to the UN Secretary-General stating that:

1. With regard to the multilateral treaties signed, ratified or acceded to by the defunct Chinese government before the establishment of the Government of the People's Republic of China, my Government will examine their contents before making a decision in the light of the circumstances as to whether or not they should be recognized.
2. As from October 1, 1949, the day of the founding of the People's Republic of China, the Chiang Kai-shek clique has no right at all to represent China. Its signature and ratification of, or accession to, any multilateral treaties by usurping the name of 'China' are all illegal and null and void. My Government will study these multilateral treaties before making a decision in the light of the circumstances as to whether or not they should be acceded to.⁷³

Although it appears that no official UN statement was released following the PRC's communication, the record of treaty participation that the UN currently holds implies acceptance of the PRC position. The treaties that

⁷¹ Jie Yan Fa [Martial Law] (ROC) (1949) <<http://law.moj.gov.tw/LawClass/LawAllIf.aspx?PCode=F0070002>> accessed 20 August 2014.

⁷² Fort Fu-Te Liao and Jau-Yuan Hwang, 'Think Globally, Do Locally – Internationalizing Taiwan's Human Rights Regime' in Peter C Y Chow (ed), *Taiwan's Modernization in Global Perspective* (Praeger 2002) 79.

⁷³ UNTC, 'Historical Information: China, Note 1' <<http://treaties.un.org/Pages/HistoricalInfo.aspx?#%22China%22>> accessed 20 August 2014.

the ROC adhered to did not automatically bind the PRC. Today, with a few exceptions, the dates of signature, ratification or accession set out in the UN Treaty Collection database reflect the actions taken by the PRC, not the ROC.⁷⁴ A complete list of human rights treaties signed and/or ratified by the ROC government prior to its de-recognition is set out in Table 1 below.

Table 1: Human right treaties signed and/or ratified by the ROC government prior to its de-recognition⁷⁵

Treaty Name	Date of ROC's Signature (s), or Ratification	Date of PRC's Signature (s), Accession (a), or Ratification	Depository's Record for "China"	Notes
Convention on the Prevention and Punishment of the Crime of Genocide	20/07/1949 (s) 05/05/1951	18/04/1983	20/07/1949 (s) 18/04/1983	The PRC declared ratification by the "Taiwan local authorities" as null and void.
Convention on the Political Rights of Women	09/06/1953 (s) 21/12/1953			Czechoslovakia, Denmark, India, the Soviet Union, the United Kingdom and Yugoslavia objected to the ROC's signature and ratification.

⁷⁴ For dates of ratification of human rights treaties by "China", see UNTC, 'Chapter IV: Human Rights' <<http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>> accessed 20 August 2014.

⁷⁵ The selection of human rights treaties is based on the list provided in the ROC's 2002 Human Rights Policy White Paper. The original list also includes the UN Charter, the Final Act of the United Nations Conference on the Elimination or Reduction of Future Statelessness, and the 1949 Geneva Conventions. Sources of dates and notes include: ROC, 'Ren Quan Li Guo Yu Ren Quan Bao Zhang De Ji Chu Jian She – 2002 Nian Guo Jia Ren Quan Zheng Ce Bai Pi Shu [Human Rights Infrastructure-Building for a Human Rights State – 2002 Human Rights Policy White Paper of the Republic of China (Taiwan)]'; Ministry of Foreign Affairs (ROC) Letter, Wai-Tiao-Yi-Zi No. 09101164450; UNTC, 'Multilateral Treaties Deposited with the Secretary-General' <<http://treaties.un.org/pages/ParticipationStatus.aspx>> accessed 20 August 2014; International Committee of the Red Cross, '1949 Conventions and Additional Protocols, and Their Commentaries' <<http://www.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp>> accessed 20 August 2014; UNESCO, 'Conventions' <http://portal.unesco.org/en/ev.php-URL_ID=12025&URL_DO=DO_TOPIC&URL_SECTION=-471.html> accessed 20 August 2014.

Treaty Name	Date of ROC's Signature (s), or Ratification	Date of PRC's Signature (s), Accession (a), or Ratification	Depository's Record for "China"	Notes
Slavery Convention, signed at Geneva on 25 September 1926 and amended by the Protocol	07/12/1953 (s) 14/12/1955			
Protocol amending the Slavery Convention signed at Geneva on 25 September 1926	07/12/1953 (s) 14/12/1955			The PRC declared signature and ratification by the "Taiwan authorities" as null and void.
Convention on the Nationality of Married Women	20/02/1957 (s) 22/09/1958		20/02/1957 (s) 22/09/1958	Czechoslovakia, Denmark, India, the Soviet Union, the United Kingdom and Yugoslavia objected to the ROC's signature and ratification.
Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery	23/5/1957 (s) 28/05/1959			Czechoslovakia, Denmark, India, the Soviet Union, the United Kingdom and Yugoslavia objected to the ROC's signature and ratification.
ILO C100 - Equal Remuneration Convention	01/03/1958	02/11/1990	02/11/1990	
ILO C105 - Abolition of Forced Labour Convention	23/01/1959			
ILO C111 - Discrimination (Employment and Occupation) Convention	31/08/1961	12/01/2006	12/01/2006	
ILO C081 - Labour Inspection Convention	26/09/1961			

Treaty Name	Date of ROC's Signature (s), or Ratification	Date of PRC's Signature (s), Accession (a), or Ratification	Depository's Record for "China"	Notes
ILO C098 - Right to Organise and Collective Bargaining Convention	10/09/1962			
ILO C105 - Abolition of Forced Labour Convention	10/09/1962			
ILO C095 - Protection of Wages Convention	22/10/1962			
Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages	04/04/1963 (s)			The PRC declared signature by the "Taiwan authorities" as null and void.
International Convention on the Elimination of All Forms of Racial Discrimination	31/03/1966 (s) 14/11/1970	29/12/1981 (a)	29/12/1981 (a)	The PRC declared signature by the "Taiwan authorities" as null and void.
International Covenant on Civil and Political Rights	05/10/1967 (s)	05/10/1998 (s)	05/10/1998 (s)	Bulgaria, Byelorussian SSR, Czechoslovakia, Mongolia, Romania, the Ukrainian SSR, the Soviet Union and Yugoslavia objected to the ROC's signature.
Optional Protocol to the International Covenant on Civil and Political Rights	05/10/1967 (s)			Bulgaria, Byelorussian SSR, Czechoslovakia, Mongolia, Romania, the Ukrainian SSR, the Soviet Union and Yugoslavia objected to the ROC's signature.

Treaty Name	Date of ROC's Signature (s), or Ratification	Date of PRC's Signature (s), Accession (a), or Ratification	Depository's Record for "China"	Notes
International Covenant on Economic, Social and Cultural Rights	05/10/1967 (s)	27/10/1997 (s) 27/03/2001	27/10/1997 (s) 27/03/2001	The PRC declared signature by the "Taiwan authorities" as null and void.
Convention against Discrimination in Education	16/11/1964			
ILO C127 - Maximum Weight Convention	23/12/1969			
ILO C092 - Accommodation of Crews Convention	23/12/1970			

These records reveal varied practice among the treaty depositories and the lack of consensus regarding the validity of the ROC government's signatures and ratifications prior to its de-recognition. In terms of ILO and UNESCO treaties, the depositories' records of "China" solely reflect the actions taken by the PRC, which suggests that the ROC's signatures and ratifications are no longer recognised. Yet no official statements can be found on the validity of the ROC's signatures and ratifications. In terms of the UN, the records of "China" are rather inconsistent. In most cases, the records of the ROC's actions are replaced by those of the PRC's actions. However, the record for the Genocide Convention documents the date of signature by the ROC (and the date of ratification by the PRC), and the record for the Convention on the Nationality of Married Women show the dates of signature and ratification by the ROC. It is unclear whether such discrepancies are deliberate or intended to demonstrate the UN's attitude towards the validity of the ROC government's signatures and ratifications prior to its de-recognition. The issue of whether these treaties remain

binding upon Taiwan is subject to further examination and will be discussed in Section III.B.2.a of this chapter.

After its de-recognition, the ROC government did not attempt to participate in human rights treaties until the mid-1990s.⁷⁶ The first instrument to which the ROC considered acceding was the CRC. The government of the ROC sent several correspondences to the UN enquiring about the possibility of ROC's accession to CRC. In 1995, a reply from the UN dismissed such possibility, citing General Assembly Resolution 2758 and emphasising that the PRC was the sole legitimate representative of China.⁷⁷ According to existing records, no further action was taken by the ROC government to follow up on the issue.

The 2000 Presidential Election saw the first change of political parties in government since the establishment of the ROC. A sign of the new government's intention to re-establish engagement with the international human rights regime can be observed in President Chen's inaugural address of 20 May that year. He stated that "[t]he new government will request the Legislative Yuan [(the parliament)] to pass and ratify the International Bill of Rights as a domestic law of Taiwan We hope to set up an independent national human rights commission in Taiwan, thereby realizing an action long advocated by the United Nations".⁷⁸ In October 2002, pursuant to a proposal from the Executive Yuan (the cabinet), the Legislative Yuan began its deliberation on a bill concerning ratifying the ICCPR and the ICESCR. Experts provided opinions on whether the ROC should ratify these two instruments, whether reservations should be

⁷⁶ See Neary (n 52) 116.

⁷⁷ The reply from the UN was noted during a discussion concerning human rights treaties in the Legislative Yuan in 2007. Legislative Yuan (ROC), 'Li Fa Yuan Gong Bao [Official Gazette of the Legislative Yuan]' vol 96, issue 6 (12 January 2007) 159.

⁷⁸ Office of the President (ROC), 'President Chen's Inaugural Address' (20 May 2000) <<http://english.president.gov.tw/Default.aspx?tabid=491&itemid=18907>> accessed 20 August 2014.

registered, and the difficulties in relation to depositing the instruments of ratification.⁷⁹ In December of the same year, the Legislative Yuan adopted the proposed bill and added reservations to a number of provisions and a declaration. For the ICCPR, reservations were made to Articles 6 (right to life) and 12 (freedom of movement), and for the ICESCR, a reservation was made to Article 8 (right to work).⁸⁰ Additionally, a declaration was made concerning Article 1 of the ICCPR. In the declaration, the Legislative Yuan indicated that:

In practice, the UN only acknowledges the right of self-determination of the people in colonies, trust territories, and non-self-governing territories, and the exercise of such a right must be predicated upon the affirmation and support by the UN General Assembly and other relevant institutions. The UN General Assembly never listed Taiwan as a colony or non-self-governing territory that have yet to achieve independence, and the people of Taiwan are not living under colonisation or other similar conditions. Thus, according to existing international treaties and practice, since the Republic of China is already an independent sovereign State, the need for the exercise of the right to self-determination has ceased.⁸¹

As this declaration reflected a questionable understanding of Article 1 of the ICCPR, a proposal to repeal this declaration was raised by one of the political parties. However, the deliberation on the repeal was postponed

⁷⁹ Legislative Yuan (ROC), 'Li Fa Yuan Gong Bao [Official Gazette of the Legislative Yuan]' vol 92, issue 3 (8 January 2003) 205-06.

⁸⁰ *ibid* 206.

⁸¹ *ibid* 264.

and had not been continued before the issue of ratifying the two Covenants was again put before the Legislative Yuan in 2008.⁸²

In 2008, the Executive Yuan again proposed that the Legislative Yuan consider completing the ratification procedures for the two Covenants, but it was only in March 2009 that the Legislative Yuan adopted the bills concerning the ratification of the two Covenants, this time with neither reservations nor declarations.⁸³ On 14 May 2009, the ROC President formally signed the instruments of ratifications of the ICCPR and the ICESCR.⁸⁴ The instruments noted that “the duly authorised representative of the Republic of China signed the Covenant on behalf of the government of the Republic of China on 5 October 1967” and accordingly the President ratified the Covenants pursuant to the relevant provisions in the Covenants (Article 48 of the ICCPR and Article 26 of the ICESCR) and the constitutional procedure.⁸⁵ A month after the instruments of ratification were sent to the UN Secretariat, the ROC received a letter from the Under Secretary-General for Legal Affairs, stating that the Secretary-General “was in no position to accept Taiwan’s ratification because of UN Resolution 2758, which recognizes the People’s Republic of China as the sole and legitimate representative of China”.⁸⁶

⁸² Legislative Yuan (ROC), ‘Li Fa Yuan Gong Bao [Official Gazette of the Legislative Yuan]’ vol 92, issue 5 (15 January 2003) 694.

⁸³ Legislative Yuan (ROC), ‘Li Fa Yuan Gong Bao [Official Gazette of the Legislative Yuan]’ vol 98, issue 14 (7 April 2009) 518.

⁸⁴ Office of the President (ROC), ‘President Ma Signs Instruments of Ratification of Two Covenants on Human Rights’ (n 38).

⁸⁵ ‘Gong Min Yu Zheng Zhi Quan Li Guo Ji Gong Yue Pi Zhun Shu [Instrument of Ratification to the International Covenant on Civil and Political Rights]’ (14 May 2009) <<http://law.moj.gov.tw/LawClass/LawAll.aspx?PCode=Y0000049>> accessed 20 August 2014 ‘Jing Ji She Hui Wen Hua Quan Li Guo Ji Gong Yue Pi Zhun Shu [Instrument of Ratification to the International Covenant on Economic, Social and Cultural Rights]’ (14 May 2009) <<http://law.moj.gov.tw/LawClass/LawAll.aspx?PCode=Y0000051>> accessed 20 August 2014.

⁸⁶ ‘Core Document Forming Part of the Reports, Republic of China (Taiwan)’ (September 2012) 1 <<http://www.humanrights.moj.gov.tw/public/Attachment/2102417215890.pdf>> accessed 20 August 2014.

A similar outcome can be observed in relation to the CEDAW. In December 2006, the Legislative Yuan began its deliberation on a bill concerning accession to the CEDAW. Although doubts were expressed as to whether the instrument of accession could be successfully deposited with the UN,⁸⁷ the Legislative Yuan eventually completed the necessary procedure, without reservations or declarations.⁸⁸ The President signed the instrument of accession to the CEDAW on 9 February 2007, and the instrument was transmitted to the UN Secretary-General by the ROC's diplomatic allies.⁸⁹ Nevertheless, the instrument of accession was eventually rejected by the UN Secretary-General in May 2007, and the attempt to officially participate in the CEDAW was unsuccessful.⁹⁰

Despite such difficulties, the ROC government continues to express its interest in participating in other international human rights treaties. Recently, in cooperation with the Presidential Office Human Rights Consultative Committee (an organ originally established to promote the domestic ratification procedure of the two Covenants),⁹¹ the Ministry of the Interior began studying the possibility of implementing the CRPD. A public hearing on the necessity of signing the CRPD was held by the Ministry in July 2013, and relevant authorities, experts, and civil society groups were invited to contribute to the discussion.⁹² A similar process was initiated to examine the necessity of signing the Convention against Torture in August

⁸⁷ Legislative Yuan (ROC), 'Li Fa Yuan Gong Bao [Official Gazette of the Legislative Yuan]' vol 96, issue 6 (12 January 2007) 161, 167.

⁸⁸ Legislative Yuan (ROC), 'Li Fa Yuan Gong Bao [Official Gazette of the Legislative Yuan]' vol 96, issue 10 (22 January 2007) 35.

⁸⁹ Ministry of Foreign Affairs (ROC), 'Ministry of Foreign Affairs Proactively Promotes Taiwan's Participation in the CEDAW' (n 37).

⁹⁰ 'Core Document Forming Part of the Reports, Republic of China (Taiwan)' (n 86) 118.

⁹¹ Office of the President (ROC), 'The Presidential Office Human Rights Consultative Committee: Origin of the Committee' <<http://english.president.gov.tw/Default.aspx?tabid=1425>> accessed 20 August 2014.

⁹² Ministry of Health and Welfare (ROC), "'Shen Xin Zhang Ai Zhe Quan Li Gong Yue Shi Xing Fa Cao An" Shu Mian Bao Gao [Report on Draft Act to Implement the Convention on the Rights of Persons with Disabilities]' <http://www.moi.gov.tw/dsa/news_content.aspx?sn=7583> accessed 20 August 2014.

2013.⁹³ The discussions are still on-going and as of August 2014, no conclusion has been reached as to whether the government would attempt to participate in these treaties.

Since the UN considers Taiwan to be a part of the PRC and therefore ineligible to participate in international human rights treaties as a State party, one might expect that the human rights situation in Taiwan would be addressed in the UN treaty bodies' reporting procedures in relation to the PRC. However, that is not the case. The human rights situation in Taiwan has not been discussed by any treaty body. While the PRC is a State party to a number of core international human rights treaties,⁹⁴ it has never reported on the implementation of those instruments in Taiwan. Available records concerning the reporting procedure also indicate that issues concerning Taiwan have not formed a part of the dialogue between the PRC and the treaty bodies.

It might be worth noting that in the work of the UN human rights treaty bodies, the practice of Taiwan has been referred to in three individual communications before the Human Rights Committee, all involving issues concerning religious freedom. Yet the references were made by parties to the communications not the Committee itself. In *Arenz v Germany*, the authors of the communication listed Taiwan as one of the six countries that officially recognised Scientology as a religion, to support the applicability of Article 18 of the ICCPR to Scientology.⁹⁵ As the Committee eventually

⁹³ Ministry of the Interior (ROC), "'Wo Guo You Wu Qian Jin Zhi Ku Xing Gong Yue Zhi Bi Yao" Gong Ting Hui [Public Hearing on the Necessity of the Signing of the Convention against Torture]' <http://www.moi.gov.tw/files/news_file/%E7%A6%81%E6%AD%A2%E9%85%B7%E5%88%91%E5%85%AC%E7%B4%84%E8%AD%B0%E7%A8%8B.doc> accessed 20 August 2014.

⁹⁴ As of July 2014, the PRC is a party to the ICERD, the ICESCR, the CEDAW, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the CRC, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, and the CRPD.

⁹⁵ *Arenz, Röder, and Röder v Germany*, Communications No 1138/2002 (29 April 2004) UN

found the communication to be inadmissible, it did not comment on the merits of the case or whether the practice of Taiwan informed the interpretation of Article 18. In *Yeo-Bum Yoon and Myung-Jin Choi v Republic of Korea* and *Eu-min Jung et al v The Republic of Korea*, concerning compulsory military service and conscientious objectors, Taiwan's alternative service arrangement was referred to by the authors and the State party. In both instances, the authors were convicted of "evasion of enlistment" after they refused to be drafted due to their religious beliefs.⁹⁶ They argued that, compared to the State party, Taiwan faced similar external threats to national security but nevertheless provided alternative forms of services to conscientious objectors.⁹⁷ On the other hand, the State party distinguished its security environment from that of Taiwan in order to justify its refusal to accept exceptions to conscription.⁹⁸ Although the Committee did consider the merits of the communications, there is no clear indication that the parties' discussions concerning Taiwan were taken into account in the Committee's finding of violations by the Republic of Korea of Article 18(1) of the ICCPR.

B. Application of International Human Rights Treaties to the ROC (Taiwan)

1. Capacity to Participate in International Human Rights Treaties

As discussed in Chapter 3, the capacity of unrecognised entities to conclude or participate in international human rights treaties stems from the principle of necessity, or the needs of the international community.

Doc CCPR/C/80/D/1138/2002, para 6.8, n 8.

⁹⁶ *Mr Yeo-Bum Yoon and Mr Myung-Jin Choi v Republic of Korea*, Communication Nos 1321/2004 and 1322/2004 (23 January 2007) UN Doc CCPR/C/88/D/1321-1322/2004, paras 2.1-2.6; *Eu-min Jung et al v The Republic of Korea*, Communications Nos 1593 to 1603/2007 (30 April 2010) UN Doc CCPR/C/98/D/1593-1603/2007, paras 2.1-2.12.

⁹⁷ *Mr Yeo-Bum Yoon and Mr Myung-Jin Choi v Republic of Korea* (n 96) para 5.4; *Eu-min Jung et al v The Republic of Korea* (n 96) para 10.

⁹⁸ *Mr Yeo-Bum Yoon and Mr Myung-Jin Choi v Republic of Korea* (n 96) para 6.5; *Eu-min Jung et al v The Republic of Korea* (n 96) para 4.3.

The necessity for acknowledging Taiwan's capacity to participate in international human rights treaties derives from two sources: territorial control exercised by Taiwan and the principle of continuity of international human rights obligations.

With regard to the former, this thesis argues that only the unrecognised entity, rather than its "parent State", is able to ensure that the rights set out in international human rights treaties are respected, protected and fulfilled. The "parent State", whose sovereignty *de jure* extends to the territories controlled by the respective unrecognised entities, cannot as a matter of fact implement the obligations under international human rights treaties. Turning to the case of Taiwan, since the establishment of the PRC in 1949, the PRC government has never exercised control over the territory of Taiwan. Such lack of control continued after the de-recognition of the ROC government and still exists today. Although increased exchanges between the PRC and Taiwan can be observed in the political, economic, and social spheres, the PRC has yet to exert real influence on the enjoyment of human rights in Taiwan. By contrast, the Taiwanese government has set up a comprehensive governmental structure whose operation affects the daily life of individuals living in Taiwan, and the government's control over the territory of Taiwan is effective and exclusive. Recalling the argument in Chapter 3 that the obligations to "respect, protect and fulfil" demand the establishment of a national system to ensure the enjoyment of human rights, it is the Taiwanese government, rather than the PRC, that is capable of providing such a system. In view of Taiwan's control over its territory, it is thus necessary to acknowledge its capacity to bear obligations under international human rights treaties in order for the rights provided in such treaties to be effectively implemented in this area.

In addition, acknowledging Taiwan's capacity to participate in international human rights treaties is also necessary for the continued application of international human rights treaties concluded by the ROC government prior to its de-recognition. Of these human rights treaties, not all have been subsequently ratified or acceded to by the PRC government. As demonstrated in Table 1, a number of treaties, including the Convention on the Political Rights of Women, the Slavery Convention and the subsequent amending Protocol, and many ILO conventions, have not been ratified by the PRC, and "China" is not considered a party to these treaties. According to the principle of continued application of international human rights obligations,⁹⁹ once these treaties entered into force in Taiwan the rights of individuals within Taiwan became safeguarded by these treaties. Individuals in Taiwan should continue to enjoy those rights despite the changes in governing entity or the entity's international legal status. It is therefore necessary to acknowledge that Taiwan has the capacity to bear obligations under the human rights treaties ratified before the de-recognition of the ROC government.

One may argue that such necessity can be minimised by having the PRC succeed the obligations under those treaties. In the case of Hong Kong and Macau, after the PRC regained sovereign control over these areas in 2007, the human rights treaties previously applicable to those areas have continued to apply, and the PRC has assumed obligations under those treaties in Hong Kong and Macau.¹⁰⁰ Yet this thesis argues that the case of Taiwan is different from that of Hong Kong and Macau, and that it remains necessary that Taiwan, rather than the PRC, takes the role of duty-bearer under international human rights treaties. Firstly, in the case of Taiwan,

⁹⁹ This principle has been discussed in Chapter 3, Section III.A.2.

¹⁰⁰ Johannes Chan, 'State Succession to Human Rights Treaties: Hong Kong and the International Covenant on Civil and Political Rights' (1996) 45 ICLQ 928.

the PRC takes the view that the signatures and ratifications of the former government, the ROC government, were illegitimate and thus null and void. This view is shared by some other States, and the UN has implied its acceptance of this position by erasing most of the signature and ratification records of the ROC.¹⁰¹ In other words, the de-recognition of the ROC government has been treated as an issue of government recognition rather than a situation triggering the application of rules concerning State succession (as in the case of Hong Kong and Macau). Accordingly the PRC has not been considered as the successor to obligations under treaties ratified by the ROC government prior to its de-recognition. The necessity to continue the application of those treaties thus justifies the attribution of obligations under those treaties to Taiwan. Secondly, as discussed in the previous paragraphs, Taiwan is the entity that is in control of its territory and capable of implementing the obligations of respecting, protecting and fulfilling human rights. The lack of territorial control of the PRC over the territory of Taiwan (unlike the areas of Hong Kong and Macau) makes it unsuitable to carry out obligations under human rights treaties.

In short, it is necessary to acknowledge that Taiwan has the capacity to participate in international human rights treaties. In order for Taiwan to be bound by such treaties, there needs to be an expression of consent by Taiwan, and the following discussion covers Taiwan's practice in relation to three means of expression of consent: submission of instruments of ratification/accession, unilateral declaration, and incorporation of human rights treaties into the domestic legal system.

2. Expression of Consent to Be Bound by International Human Rights Treaties

¹⁰¹ See Table 1.

a. Submission of Instruments of Ratification/Accession

In relation to the human rights treaties signed and/or ratified by the ROC government prior to its de-recognition, there have been no formal decisions adopted by the depositories of those treaties concerning the validity of the signatures and ratifications. In the case of the UN, although the PRC has issued declarations stating that the ROC's signatures and ratifications were illegal and null and void, the UN has not responded to such declarations. Although the attitude of the UN toward this matter has not been clear, in the "Historical Information" section of the UN Treaty Series publication, under "China", a note concerning this issue has been appended, which states that "[a]ll entries recorded throughout this publication in respect of China refer to actions taken by the authorities representing China in the United Nations at the time of those actions".¹⁰² This statement might be interpreted to imply that the ROC government's signatures and/or ratifications were considered valid at the time they were made. Further, the record of China's participation that the UN currently holds indeed includes a number of signatures and one ratification by the ROC government. However, in most cases, the record of the ROC's signature and/or ratification was erased and replaced with the record of the PRC's action. While the validity of the ROC government's signatures and ratifications prior to its de-recognition remains disputed at the international level, according to the principle of continued application of international human rights obligations discussed above and in Chapter 3,¹⁰³ the treaties acceded to by the ROC prior to 1970 should continue to apply.

¹⁰² UNTC, 'Historical Information: China, Note 1' (n 73).

¹⁰³ This principle has been discussed in Chapter 3, Section III.A.2.

Furthermore, it is clear that the ROC government considers itself bound by the treaties signed or ratified prior to its de-recognition.¹⁰⁴

Turning to the human rights treaties that Taiwan has attempted to participate in in recent years, the CEDAW, the ICCPR and the ICESCR, as noted previously, the instruments of ratification/accession that Taiwan submitted were not accepted by the UN Secretary-General. While Taiwan's attempts were not successful, these submissions, which illustrate Taiwan's intention to be a party to the relevant instruments, may be considered as unilateral declarations that express Taiwan's consent to be bound.

b. Unilateral Declaration

With regard to the CEDAW, the ICCPR and the ICESCR, in addition to the submission of instruments of ratification/accession, Taiwan has, on many occasions, unilaterally declared its consent to be bound by these instruments. Government officials and organs have issued statements expressing the government's resolve to undertake the obligations embedded in the three treaties. For instance, the Taiwanese Ministry of Foreign Affairs issued a press release on 30 April 2007, indicating the government's intention to "abid[e] by the [CEDAW]'s stipulations".¹⁰⁵ Additionally, the President has on occasion highlighted the government's political will to "implement" the ICCPR and the ICESCR.¹⁰⁶ Similar declarations can also be found in Taiwan's reports on the implementation of the three instruments.¹⁰⁷ These statements can be considered as

¹⁰⁴ 'Core Document Forming Part of the Reports, Republic of China (Taiwan)' (n 86) 58.

¹⁰⁵ Ministry of Foreign Affairs (ROC), 'Ministry of Foreign Affairs Proactively Promotes Taiwan's Participation in the CEDAW' (n 37).

¹⁰⁶ Office of the President (ROC), 'President Ma Signs Instruments of Ratification of Two Covenants on Human Rights' (n 38); 'Core Document Forming Part of the Reports, Republic of China (Taiwan)' (n 86) I (foreword by the ROC President).

¹⁰⁷ 'Initial Report under the Convention on the Elimination of All Forms of Discrimination against Women' <<http://www.iwomenweb.org.tw/Upload/UserFiles/%E5%88%9D%E6%AC%A1%E5%9C%8B%E5%AE%B6%E5%A0%B1%E5%91%8A.pdf>> accessed 20 August 2014.

Taiwan's unilateral declaration of its consent to be bound by the three international human rights treaties as the statements clearly indicate the intention to undertake international legal obligations. As argued in Chapter 3, the unilateral declarations issued by unrecognised entities should be considered binding as a matter of international law, considering that the capacity to issue such declarations closely relates to the capacity to conclude or participate in treaties. This position draws upon the ILC's opinion that "just as '(e)very State possesses capacity to conclude treaties', every State can commit itself through acts whereby it unilaterally undertakes legal obligations".¹⁰⁸ Also, acknowledging such binding force in the case of unrecognised entities may remedy the legal vacuum created by their exclusion from official participation in international human rights treaties. Thus, the official statements and declarations of Taiwan concerning its commitment to implement the three treaties should be considered as creating binding obligations under international human rights law.

c. Incorporation of Human Rights Treaties into the Domestic Legal System

The incorporation of international human rights treaties into the domestic legal system shows the government's intention to enforce domestically the rights provided in those treaties and can be interpreted as an expression of

For initial reports on the implementation of the two Covenants and an accompanying Core Document, see 'Implementation of the International Covenant on Civil and Political Rights: Initial Report Submitted under Article 40 of the Covenant: Republic of China (Taiwan)' (September 2012) <<http://www.humanrights.moj.gov.tw/public/Attachment/21041062855.pdf>> accessed 20 August 2014; 'Implementation of the International Covenant on Economic, Social and Cultural Rights: Initial Report Submitted under Articles 16 and 17 of the Covenant: Republic of China (Taiwan)' (September 2012) <<http://www.humanrights.moj.gov.tw/public/Attachment/21041071263.pdf>> accessed 20 August 2014; 'Core Document Forming Part of the Reports: Republic of China (Taiwan)' (September 2012) <<http://www.humanrights.moj.gov.tw/public/Attachment/2104105692.pdf>> accessed 20 August 2014.

¹⁰⁸ ILC, 'Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, with Commentaries thereto' Yearbook of the International Law Commission, 2006, vol II(2) (2006) UN Doc A/CN.4/SER.A/2006/Add.1 (Part 2) 371.

consent to be bound by them. Such incorporation can be observed in various practices of the government. In relation to the human rights treaties that the Taiwanese government has attempted to ratify, having predicted that its submissions of instruments of ratification/accession would not be accepted by the UN Secretary-General, the government decided to promulgate special legislation to incorporate the CEDAW, the ICCPR, and the ICESCR.¹⁰⁹

It is disputed whether the legal system in Taiwan is a monist system (and thus considering domestic law and international law as belonging to one unitary legal order) and whether international treaties have the status of domestic law, and in 1993, a related question was put to the Constitutional Court, which is mandated to issue Judicial Yuan Interpretations on constitutional controversies upon petition by individuals, members of the Legislative Yuan, or judges.¹¹⁰ According to the Court's interpretation,¹¹¹ had the UN Secretary-General accepted the instruments of ratification/accession, these human rights treaties would have undoubtedly become binding upon Taiwan and thus automatically become a part of the domestic legal system. The Court's interpretation suggests that the legal system in Taiwan is a monist one. Yet, the instruments of ratification/accession were rejected by the UN, leaving the binding force of the treaties upon Taiwan open to question, and domestic legislation is needed in order to ensure that these human rights treaties acquire the status of domestic law in Taiwan. Therefore, the Legislative Yuan passed acts for the purpose of implementation of treaties. The Act to Implement

¹⁰⁹ Office of the President (ROC), 'President Ma Signs Instruments of Ratification of Two Covenants on Human Rights' (n 38).

¹¹⁰ Constitutional Interpretation Procedure Act (ROC) art 5 <http://www.judicial.gov.tw/constitutionalcourt/EN/p07_2.asp?lawno=73> accessed 20 August 2014.

¹¹¹ Judicial Yuan (ROC), 'Judicial Yuan Interpretation No. 392' (24 December 1993) <http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=329> accessed 20 August 2014.

the ICCPR and the ICESCR was adopted in 2009, and Article 2 of that Act provides that: "Human rights protection provisions in the two Covenants have domestic legal status".¹¹² The same Act also requires:

All levels of governmental institutions and agencies should review laws, regulations, directions and administrative measures within their functions according to the two Covenants. All laws, regulations, directions and administrative measures incompatible to the two Covenants should be amended within two years after the Act enters into force by new laws, law amendments, law abolitions and improved administrative measures.¹¹³

In 2011, the Legislative Yuan adopted the Enforcement Act of Convention on the Elimination of All Forms of Discrimination against Women, which contains similar provisions to the Act to Implement the ICCPR and the ICESCR.¹¹⁴

Following the government's attempt to participate in the three human rights treaties, the Ministry of Justice has been tasked with the function of overseeing the review required by the enforcement acts. By June 2014, more than 260 pieces of legislation and other measures had been nominated as potentially incompatible with the two Covenants, and a process of further examination and amendment is under way.¹¹⁵ In

¹¹² Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (ROC) art 2 <<http://mojlaw.moj.gov.tw/EngLawContent.aspx?id=3>> accessed 20 August 2014.

¹¹³ *ibid* art 8.

¹¹⁴ Enforcement Act of Convention on the Elimination of All Forms of Discrimination against Women (ROC) <<http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=D0050175>> accessed 20 August 2014.

¹¹⁵ Ministry of Justice (ROC), '263 Ze Wei Fan Gong Zheng Gong Yue Ji Jing She Wen Gong Yue Wei Xiu Zheng Zhi "Fa Lu An", "Ming Ling An", Ji "Xing Zheng Cuo Shi An" Jian Tao Jin Du [Progress of Review of 263 Unamended Laws, Orders and Administrative Measures Incompatible with ICCPR and the ICESCR]' <<http://www.humanrights.moj.gov.tw/ct.asp?xItem=283349&CtNode=32910&mp=200>> accessed 20 August 2014.

addition, a Human Rights Consultative Committee was created under the Office of the President, with the Vice President serving as the Chairperson of the Committee, to study international human rights law and relevant mechanisms and to provide opinion on human rights policies in Taiwan. This Committee is also mandated with the function of preparing national reports in accordance with the requirements under human rights treaties. Since these reports cannot be submitted to the UN human rights treaty bodies, the Taiwanese government has devised a unique mechanism that mirrors the UN treaty body reporting procedure.¹¹⁶ International human rights law experts, including a number of former members of UN treaty bodies, are invited to form a review committee for each of the three human rights instruments.¹¹⁷ The committees conduct reviews of Taiwan's national reports, and, at the end of the review process including dialogues with representatives from various government organs, issue concluding observations on Taiwan's implementation of the respective human rights treaties. Civil society organisations are also invited to participate in this process, by participating in the preparation of national reports, preparing shadow reports, and meeting with the experts. The review of the initial report on the CEDAW was concluded in 2011, and the review of the initial reports on the two Covenants was concluded in March 2013.¹¹⁸

Turning to the jurisprudence of domestic courts, invocation of the three international human rights treaties has become increasingly common. The Constitutional Court referred to human rights treaties even before Taiwan's

¹¹⁶ Documents relevant to the review process and videos of the review meetings are made available online. See Ministry of Justice (ROC), 'Chu Ci Quo Jia Bao Gao Zhi Guo Ji Shen Cha (2013) [Review of Initial State Reports (2013)]' <<http://www.humanrights.moj.gov.tw/np.asp?ctNode=33565&mp=200>> accessed 20 August 2014.

¹¹⁷ The experts invited to review Taiwan's first report on the implementation of the ICCPR were Nisuke Ando, Jerome Cohen, Shanthi Dairiam, Asma Jahangir, and Manfred Nowak, and the experts for the review of the ICESCR report were Philip Alston, Theodoor Cornelis van Boven, Virginia Bonoan-Dandan, Eibe Riedel, and Heisoo Shin.

¹¹⁸ For concluding observations and recommendations of the review panel, see Ministry of Justice (ROC), 'Concluding Observations and Recommendations' <<http://www.humanrights.moj.gov.tw/ct.asp?xItem=298633&ctNode=33698&mp=200>> accessed 20 August 2014.

attempt to ratify the CEDAW, the ICCPR, and the ICESCR. Yet in its earlier interpretations, the international human rights instruments were invoked as evidence of international trend or universal value, rather than binding sources of law. For instance, *Judicial Yuan Interpretation No. 582*, adopted in July 2004, listed Article 14(3)(e) of the ICCPR (along with provisions of the European Convention on Human Rights, the Constitution of the US, and the Codes of Criminal Procedure of Japan and Germany) as evidence that the right of a defendant to examine the witnesses against him/her has been “universally provided”.¹¹⁹

After the incorporation of the three treaties into the domestic legal system, the Constitutional Court has made increased use of the three treaties in Judicial Yuan Interpretations, and a number of general comments adopted by the treaty bodies have been used to determine the scope of rights. For instance, *Judicial Yuan Interpretation No. 710*, adopted in July 2013, examined the constitutionality of a provision in domestic legislation on the expulsion of PRC nationals who legally entered the territory of the ROC, and the Court referred to Article 12 of the ICCPR and paragraph 6 of the Human Rights Committee’s General Comment No. 15, arriving at the conclusion that the constitutional protection of freedom of movement extends to such PRC nationals.¹²⁰ The trend of applying international human rights treaties can be particularly observed in the individual opinions of Justices.¹²¹ Justice Shin-Min Chen, in his concurring opinion for

¹¹⁹ Judicial Yuan (ROC), ‘Judicial Yuan Interpretation No. 582’ (23 July 2004) <http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=582> accessed 20 August 2014.

¹²⁰ Judicial Yuan (ROC), ‘Judicial Yuan Interpretation No. 710’ (5 July 2013) <http://www.judicial.gov.tw/constitutionalcourt/p03_01.asp?expno=710> accessed 20 August 2014 (in Chinese).

¹²¹ Eg Judicial Yuan (ROC), ‘Judicial Yuan Interpretation No. 708’ (6 February 2013), Concurring Opinion by Justice Yeong-Chin Su <http://www.judicial.gov.tw/constitutionalcourt/uploadfile/C100/708%E5%8D%94%E5%90%8C%E6%84%8F%E8%A6%8B%E6%9B%B8_%E8%98%87%E5%A4%A7%E6%B3%95%E5%AE%98%E6%B0%B8%E6%AC%BD_.pdf> accessed 20 August 2014 (in Chinese) (freedom of movement); Judicial Yuan (ROC), ‘Judicial Yuan Interpretation No. 696’ (20 January 2012), Concurring Opinion by Justice Lo-chang Fa

Interpretation No. 701, adopted in July 2012, specified that Article 12 of the ICESCR, which has now obtained domestic legal status, requires the “creation of conditions which would assure to all medical service and medical attention in the event of sickness”,¹²² and such a requirement establishes a new right in the domestic legal system.

In addition to the Constitutional Court, courts of all levels in Taiwan have applied the CEDAW, the ICCPR, and the ICESCR more frequently and in more detail.¹²³ Subsequent to the review of Taiwan’s reports on the implementation of the two Covenants, a number of judgments even refer to specific concluding observations adopted by the committee of experts. For instance, in two cases decided by the Taipei High Administrative Court concerning the denial of resident visa applications for foreign spouses, the judgments refer to paragraph 46 of the concluding observations concerning “marriage immigrants” from Southeast Asia and the difficulties they face in their enjoyment of economic, social and cultural rights.¹²⁴

Although under international law, the incorporation of rules of international law into a domestic legal system does not automatically create binding international obligations, all the measures described above in fact reinforce the unilateral declarations which commit Taiwan to the three international human rights treaties. Further, they show that the government has acted in the belief that it is under an obligation to implement the three treaties and in fact has the capacity to do so, which echoes the necessity argument

<http://www.judicial.gov.tw/constitutionalcourt/uploadfile/C100/696%E5%8D%94%E5%90%8C%E6%84%8F%E8%A6%8B%E6%9B%B8_%E7%BE%85%E6%98%8C%E7%99%BC_.pdf> accessed 20 August 2014 (in Chinese) (the right to marry and found a family).

¹²² Judicial Yuan (ROC), ‘Judicial Yuan Interpretation No. 701’ (6 July 2012), Concurring Opinion by Justice Shin-Min Chen <<http://www.judicial.gov.tw/constitutionalcourt/uploadfile/C100/%E9%87%8B701%E5%8D%94%E5%90%8C%E6%84%8F%E8%A6%8B%E6%9B%B8-%E9%99%B3%E5%A4%A7%E6%B3%95%E5%AE%98%E6%96%B0%E6%B0%91.pdf>> accessed 20 August 2014 (in Chinese) (right to health).

¹²³ Eg Supreme Court (ROC) Judgment, 99-Tai-Shang-1983 (31 March 2010); Supreme Court (ROC) Judgment, 98-Tai-Shang-5283 (17 September 2009).

¹²⁴ Eg Taipei High Administrative Court (ROC) Judgment, 102-Su-16 (23 May 2013); Taipei High Administrative Court (ROC) Judgment, 102-Su-259 (23 May 2013).

that Taiwan is the proper duty-bearer to respect, protect and fulfil human rights in the territory that it controls.

IV. The Application of General International Human Rights Law to the ROC (Taiwan)

A. The ROC (Taiwan) and General International Human Rights Law

The discussion below provides a survey of the practice concerning the ROC's involvement in international bodies whose work relates to general international human rights law, as well as their attitudes concerning the human rights situations in Taiwan. Such practice will then serve as the basis for the subsequent discussion regarding the applicability of general international human rights law to Taiwan.

1. Before the De-Recognition of the ROC Government

Soon after the establishment of the UN, its Economic and Social Council adopted a resolution establishing the Commission on Human Rights. The same resolution mandated the Commission to prepare an international bill of rights and designated the initial seven members of the nuclear Commission, including an ROC representative.¹²⁵ Per a recommendation by the nuclear Commission,¹²⁶ in 1946, a full Commission was established to draft an international bill of rights.¹²⁷ Peng-chun Chang of the ROC was the Vice-Chair of both the Commission and the Drafting Committee tasked

¹²⁵ UN ECOSOC, 'Commission on Human Rights and Sub-Commission on the Status of Women' (22 February 1946) UN Doc E/27, para 7. As the Economic and Social Council decided to establish Commission on Human Rights, it indicated that "[i]nitially, the Commission shall consist of a nucleus of nine members appointed in their individual capacity for a term of office expiring on 31 March 1947". The nuclear Commission served most of the functions designated to the Commission on Human Rights and was tasked to make recommendations regarding the composition of the Commission. *ibid* para 6.

¹²⁶ UN ECOSOC, 'Draft Resolution of the Economic and Social Council: Commission on Human Rights' (5 June 1946) UN Doc E/56, para 6.

¹²⁷ UN ECOSOC, 'Draft Resolution Concerning the Report of the Commission on Human Rights' (19 June 1946) UN Doc E/56/Rev.1.

to prepare a text that would later become the UDHR. He is known for introducing Chinese approaches to various issues in the drafting process and considered to be instrumental in resolving many stalemates during negotiation.¹²⁸ An example of the former characteristic can be observed in the discussion on draft Article 16 (ultimately Article 18) on freedom of thought, conscience, and religion. He introduced the Chinese approach to religious issues, emphasising the pluralistic tolerance embedded in Chinese philosophy.¹²⁹ When the draft declaration was put to a vote on 10 December 1948, the ROC was among the 48 States that voted in favour.¹³⁰ The ROC also participated in the work of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. For instance, when the Sub-Commission was considering drafting a set of principles on freedom and non-discrimination in the matter of religious rights and practices, the ROC representative expressed support towards this exercise by referring to the provision in the ROC constitution which guarantees freedom of religious belief for all.¹³¹

2. After the De-Recognition of the ROC Government

After 1971, Taiwan lost most of its opportunities to participate in any inter-governmental organisations or forums, including those related to human rights, and the human rights situation in Taiwan has received little attention from the UN and other international organisations. Although there have been instances where the UN human rights special procedures mandate holders have noted issues of human rights concern in Taiwan, the references have been very limited, and only one actually addressed the

¹²⁸ See John P Humphrey, *Human Rights & the United Nations: A Great Adventure* (Transnational 1984) 23.

¹²⁹ UNGA, 'Hundred and Twenty-Seventh Meeting of the Third Committee, 9 November 1948' (1948) UN Doc A/C.3/SR.127, 398.

¹³⁰ UN GAOR 3rd Session, 183th Plenary Meeting (10 December 1948) UN Doc A/PV.183, 933.

¹³¹ UNCHR, 'Draft Principles on Freedom and Non-Discrimination in the Matter of Religious Rights and Practices' (20 December 1960) UN Doc E/CN.4/809, 4.

obligations of Taiwan under international human rights law. In November 1998, 3,000 tonnes of toxic waste, exported by a Taiwanese petrochemical firm (Formosa Plastics), was dumped in Sihanoukville, Cambodia, and this incident was linked to cases of deaths and illness in the local community.¹³² Furthermore, the demonstration against such dumping resulted in the arrest of two protesters. After receiving relevant information, the UN Special Rapporteur on the Adverse Effects of the Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights sent communications to the governments of Cambodia and Taiwan respectively. According to the report prepared by the Special Rapporteur, no reply from the "Government of Taiwan (province of China)" was received,¹³³ and the comment of the Special Rapporteur only contained recommendations to the measures to be taken by the Cambodian government. In the report, no reference was made in relation to the role that the Taiwanese government should play in this regard.

Another incident that caught the attention of UN special procedures was the eviction of residents in the Lo-Sheng Sanatorium in Taipei. The Sanatorium was built in 1930 as an isolation hospital for leprosy patients. While it no longer serves the function of an isolation hospital, 300 residents remain in the Sanatorium. The eviction controversy arose when the plan for a new line of the Mass Rapid Transit System¹³⁴ was revealed, and the Lo-Sheng Sanatorium was designated as one of the locations for the construction. In order to facilitate such construction, the eviction of the Sanatorium residents was planned. Upon receiving relevant information,

¹³² Human Rights Watch, *Toxic Justice: Human Rights, Justice and Toxic Waste in Cambodia* <<http://www.hrw.org/reports/1999/cambotox/>> accessed 15 July 2013.

¹³³ UNCHR, 'Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights: Report Submitted by Special Rapporteur on Toxic Waste' (20 March 2000) UN Doc E/CN.4/2000/50, 17.

¹³⁴ The system is now known as the Taipei Metro, a transit system similar to the London underground.

the UN Special Rapporteurs on the Right to Health and on the Right to an Adequate Standard of Living issued a joint statement, expressing their concern over the imminent eviction. In the statement, the Special Rapporteurs “remind[ed] the authorities of their obligations under international human rights law, including the International Covenant on Economic, Social and Cultural Rights, especially with regard to the right to health and the right to adequate housing”.¹³⁵ They further urged “the authorities” to engage in consultation with the Sanatorium residents to explore all possible alternatives, and in the case of eviction, to provide adequate remedies and procedures to those affected.¹³⁶ At the time this statement was issued, Taiwan had not attempted to ratify the ICESCR, and the Special Rapporteurs did not provide further elaboration on the sources of law supporting their statement. Nevertheless, this marks the only occasion where UN special procedures human rights mandate holders have remarked on the “obligations” of Taiwan under international human rights law.

There have been reports of Taiwanese local NGOs sending other Special Procedures mandate holders communications of alleged human rights violations by the Taiwanese government, and some NGOs reportedly met with the relevant mandate holders to discuss their communications. For instance, the Special Rapporteur on the Rights of Indigenous Peoples reportedly acknowledged receipt of a communication by a Taiwanese NGO concerning the government’s refusal to recognise the *Pingpu*, tribes of aborigines originally residing in lowland regions in Taiwan, as indigenous people.¹³⁷ Yet, these communications have not been recorded in any

¹³⁵ UN OHCHR, ‘UN Experts Express Concern over Imminent Eviction of Taiwanese Residents in Lo-Sheng Sanatorium’ (20 July 2005) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=3329&LangID=E>> accessed 20 August 2014.

¹³⁶ *ibid.*

¹³⁷ ‘Pingpu Recognition Would Require Law Revision: CIP’ *Taipei Times* (27 May 2010)

official reports submitted by those mandate holders, and no known action has been taken by the Special Rapporteur.

Another mechanism in the UN human rights machinery is the Universal Periodic Review (UPR), which examines, on a periodic basis, the fulfilment by each of the UN's Member States of their human rights obligations and commitments.¹³⁸ Although the mechanism aims to be "universal" in nature, the human rights situation in Taiwan has not been examined in this context. The PRC underwent its first UPR in February 2009 and its second UPR in October 2013, and none of the documents forming the basis of the review¹³⁹ (national report,¹⁴⁰ compilation of UN information,¹⁴¹ and summary of stakeholders' submissions¹⁴²) included information on the human rights situation in Taiwan. Neither was the issue raised by other States during the dialogues with China or addressed in the final UPR reports.¹⁴³

<<http://www.taipeitimes.com/News/taiwan/archives/2010/05/27/2003473997>> accessed 20 August 2014.

¹³⁸ UNGA Res 60/251 (15 March 2006) UN Doc A/RES/60/251, para 5(e).

¹³⁹ UN Human Rights Council Res 5/1 (18 June 2007) UN Doc A/HRC/RES/5/1, Annex, para 15.

¹⁴⁰ 'National Reports Submitted in Accordance with Paragraph 15(a) of the Annex to Human Rights Council Resolution 5/1: China' (10 November 2008) UN Doc A/HRC/WG.6/4/CHN/1; 'National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21: China' (5 August 2013) UN Doc A/HRC/WG.6/17/CHN/1.

¹⁴¹ 'Compilation Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(b) of the Annex to Human Rights Council Resolution 5/1: China (including Hong Kong and Macao Special Administrative Regions (HKSAR and MSAR))' (16 December 2008) UN Doc A/HRC/WG.6/4/CHN/2; 'Compilation Prepared by the Office of the High Commissioner for Human Rights in Accordance with Paragraph 15 (b) of the Annex to Human Rights Council Resolution 5/1 and paragraph 5 of the Annex to Council Resolution 16/21: China (Including Hong Kong, China and Macao, China)' (7 August 2013) UN Doc A/HRC/WG.6/17/CHN/2.

¹⁴² 'Summary Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(c) of the Annex to Human Rights Council Resolution 5/1: People's Republic of China (including Hong Kong and Macao Special Administrative Regions (HKSAR) and (MSAR))' (5 January 2009) UN Doc A/HRC/WG.6/4/CHN/3; 'Summary Prepared by the Office of the High Commissioner for Human Rights in Accordance with Paragraph 15 (b) of the Annex to Human Rights Council Resolution 5/1 and Paragraph 5 of the Annex to Council Resolution 16/21: People's Republic of China (Including Hong Kong and Macao Special Administrative Regions (HKSAR) (MSAR))' (30 July 2013) UN Doc A/HRC/WG.6/17/CHN/3.

¹⁴³ 'Report of the Working Group on the Universal Periodic Review: China' (5 October 2009) UN Doc A/HRC/11/25; 'Report of the Working Group on the Universal Periodic Review: China (Including Hong Kong, China and Macao, China)' (4 December 2013) UN Doc A/HRC/25/5.

Nevertheless, it is worth noting that the UN Permanent Forum on Indigenous Issues (UNPFII), established by the UN Economic and Social Council to “discuss indigenous issues ... relating to economic and social development, culture, the environment, education, health and human rights”,¹⁴⁴ has been attended by representatives of both the Taiwanese government and local NGOs since its inaugural session in 2002. Taiwan even hosted the 2009 Asian preparatory meeting for the Eighth UNPFII. Reports written by the participants suggest that issues concerning the indigenous peoples in Taiwan or raised by the Taiwanese delegation were discussed.¹⁴⁵ However, no relevant conclusion or recommendation was made in the UNPFII’s reports as a result of such discussions.¹⁴⁶

While inter-governmental organisations have paid little attention to the human rights situations in Taiwan, international NGOs have more often addressed issues of human rights concerning Taiwan. The reports and statements issued by NGOs are often critical of the government’s practice in relation to the death penalty,¹⁴⁷ treatment of migrant workers,¹⁴⁸ and rights of indigenous peoples,¹⁴⁹ amongst others issues. In fact, a number of international NGOs have included issues of human rights in Taiwan in their submissions to various UN organs, even though such submissions

¹⁴⁴ UN ECOSOC ‘Establishment of a Permanent Forum on Indigenous Issues’ Res 2000/22 (28 July 2000) para 2.

¹⁴⁵ Hui-wen Chin, ‘Can Yu Lian He Guo Di Wu Jie Yuan Zhu Min Zu Yi Ti Chang She Lun Tan Yu Wei Lai Zhan Wang [Participation in the Fifth UNPFII and Future Prospects]’ *Xin Shi Ji Zhi Ku Lun Tan* [New Century Think Tank Forum] (30 December 2006) 86 <<http://www.taiwanncf.org.tw/tforum/36/36-14.pdf>> accessed 20 August 2014; Patrick Thornberry, *Indigenous Peoples and Human Rights* (Manchester UP 2002) 13.

¹⁴⁶ Council of Indigenous Peoples, Executive Yuan (ROC), ‘Can Jia 2011 Nian Di 10 Jie Lian He Guo Yuan Zhu Min Zu Yi Ti Chang She Lun Tan [Report on the Participation of the 10th UN Permanent Forum on Indigenous Issues in 2011]’ (30 July 2011) 18 <<http://www.taiwan.gov.tw/public/Attachment/343011392871.pdf>> accessed 20 August 2014.

¹⁴⁷ Human Rights Watch, ‘Taiwan: Reinstate Moratorium on Death Penalty: 12 Executions in 4 Months Sets Back Rule of Law’ (25 April 2013) <<http://www.hrw.org/news/2013/04/25/taiwan-reinstate-moratorium-death-penalty>> accessed 20 August 2014.

¹⁴⁸ Migrant Forum in Asia, ‘Submission to the Committee on Migrant Workers Day of General Discussion on Undocumented Migrant Workers’ (2011) 4-5 <http://www2.ohchr.org/english/bodies/cmw/docs/DGD/MigrantForumAsia_DGD2011.pdf> accessed 20 August 2014.

¹⁴⁹ Minority Rights Group International, ‘State of the World’s Minorities and Indigenous Peoples 2014’ (2014) 152 <<http://www.minorityrights.org/download.php?id=1382>> accessed 20 August 2014.

usually do not result in any substantive discussions in the UN. For instance, in a 1993 report concerning the solution of problems involving minorities submitted by Asbjørn Eide, a member of the former Sub-Commission on the Promotion and Protection of Human Rights, recorded a submission by the International Catholic Migration Commission. The submission addressed issues such as the standard of living of indigenous peoples in Taiwan and the exploitation of undocumented foreign workers by private individuals.¹⁵⁰ Another example can be found in an oral intervention before the Commission on Human Rights by a representative for the Coalition against Trafficking in Women in March 1998. The statement indicated serious concerns regarding prostitution and trafficking of women and girls in Asian countries, particularly in Taiwan.¹⁵¹ In the statement, the organisation also called for the provision of access to Taiwanese NGOs to UN bodies and urged the Special Rapporteur on violence against women to thoroughly investigate the issue of trafficking in women and girls in countries including Taiwan.¹⁵²

In short, it can be observed that after 1971, discussions concerning Taiwan and general international human rights law have been limited. Particularly at the inter-governmental level, very few references can be found in relation to the obligations of the Taiwanese government under general international human rights law.

B. Application of General International Human Rights Law to the ROC (Taiwan)

¹⁵⁰ UNCHR Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities, Final Report Submitted by Mr Asbjørn Eide' (16 July 1993) UN Doc E/CN.4/Sub.2/1993/34/Add.2, 17-18.

¹⁵¹ UNCHR, Fifty-Fourth Session 'Summary Record of the 25th Meeting, 31 March 1998' (31 August 1998) UN Doc E/CN.4/1998/SR.25, paras 79-81.

¹⁵² *ibid* para 82.

1. The Notion of Necessity and the Application of General International Human Rights Law to the ROC (Taiwan)

Although Taiwan had participated in the human rights-related work of the UN prior to 1971, whether general international human rights law continues to apply to Taiwan until present day remains to be explored. A few observations can be made based upon the practice introduced above. Firstly, after the de-recognition of the ROC government, the human rights situation in Taiwan has received very little attention at the international level. Not only is Taiwan excluded from participating in inter-governmental bodies that examine States' implementation of human rights, Taiwan is also absent from any monitoring of implementation on the part of China. Secondly, even in situations where human rights issues concerning Taiwan are brought about in international fora, few discussions actually touch upon the question of whether Taiwan bears obligations under general international human rights law. However, this lack of discussion should not be interpreted to suggest that general international human rights law should not apply to Taiwan. It can be argued that such a vacuum in fact confirms the need for more attention and an acknowledgment that general international human rights law does apply and that the Taiwanese government bears corresponding obligations under international law.

As discussed in Chapter 4, the binding force of general international human rights law does not only stem from the consent of States. The fact that some rules apply irrespective of opposition or withdrawal of consent of States demonstrates that those rules need to be binding for the peaceful co-existence of States and the order of the international community. The notion of necessity also serves as a basis for justifying the application of general international human rights law to certain non-State actors. Chapter 4 argues that obligations of general international human rights law

should be imposed on entities taking on functions of States and/or exercising effective control over territories and populations, because such expansion of scope of application is necessary to ensure the protection of human rights in areas where States cannot exercise control.

Turning to the case of Taiwan, as described in Section II, Taiwan indeed displays characteristics and exercises functions of a State, including exerting effective and exclusive territorial control. Applying the arguments presented in Chapter 4, it is necessary to apply general international human rights law to Taiwan. In addition, the international human rights treaties in which Taiwan attempts to participate remain limited. Even though discussions are ongoing regarding the “ratification” of other instruments, it is likely that such “ratifications” will not be completed in the near future. Thus, the necessity to impose on Taiwan obligations under general international human rights law becomes even more evident in order to ensure individuals in Taiwan enjoy comprehensive human rights protection.

2. The Application of General International Human Rights Law at the Domestic Level in the ROC (Taiwan)

While necessity may serve as the basis for the binding force of general international human rights law upon Taiwan, the following discussion examines whether general international human rights law has been applied at the domestic level.

In terms of Taiwan’s practice, there is a lack of focus on general international human rights law, as opposed to treaties. Such a tendency

can be observed in statements of government officials,¹⁵³ human rights white papers,¹⁵⁴ and national human rights reports.¹⁵⁵ When these statements and documents express the government's commitment to implement international human rights standards or examine the human rights situations in Taiwan, references are usually made to international human rights treaties, especially the ICCPR and the ICESCR. It may be argued that, having been isolated from the international human rights system since its de-recognition, the Taiwanese government deems (attempted) participation in international human rights treaties as the most direct way to resume interaction with the system. Yet, the government's treaty-focused approach does not imply that it does not consider itself bound by general international human rights law.

As a matter of domestic law, it is unclear if general international human rights law is applicable law in courts in Taiwan. The ROC Constitution does not specify the status of general international law in the domestic legal system, and to date there has not been a constitutional interpretation providing clarification on this topic. Unlike human rights treaties, rules of general international human rights law has rarely been invoked by parties in cases or served as the basis for judges' opinions. In situations where judgments involve discussions concerning international human rights standards other than treaty provisions, references are usually made to "international human rights precedents" (jurisprudence of regional human rights courts),¹⁵⁶ "rules of international human rights law",¹⁵⁷ or simply

¹⁵³ Office of the President (ROC), 'President Chen's Inaugural Address' (n 78).

¹⁵⁴ ROC, 'Ren Quan Li Guo Yu Ren Quan Bao Zhang De Ji Chu Jian She – 2002 Nian Guo Jia Ren Quan Zheng Ce Bai Pi Shu [Human Rights Infrastructure-Building for a Human Rights State – 2002 Human Rights Policy White Paper of the Republic of China (Taiwan)]'.

¹⁵⁵ See ROC, '2002 Nian Guo Jia Ren Quan Bao Gao (Shi Xing Bao Gao) [2002 National Human Rights Report (Trial Report)]' (December 2003); ROC, '2007-2008 Nian Guo Jia Ren Quan Bao Gao (Shi Xing Bao Gao) [2007-2008 National Human Rights Report (Trial Report)]' (December 2009).

¹⁵⁶ Eg Taiwan High Court (ROC) Judgment, 96-Zhu-Shang-Geng-Yi-1 (3 January March 2008); Taiwan High Court (ROC) Judgment, 101-Shang-Zhong-Geng-San-Zi-4 (14 May 2013) (both

"international human rights".¹⁵⁸ While it may be argued that some of these notions overlap with the concept of general international law, these vague references were usually made by the courts when summarising the submissions of the parties, and there is no clear indication that these standards subsequently served as the basis for the judgments. A rare example of the courts applying standards other than human rights treaties is a case decided by the Taipei High Administrative Court in 2013.¹⁵⁹ In this case, the applicant, a death row inmate, attempted to send out letters documenting his personal life and experience, but he was later asked by the prison officials to amend the letters on account of potential disruption of discipline and order in the prison. The applicant refused to abide by such a request and thus brought a case alleging violation of his freedoms of expression and privacy of correspondence.¹⁶⁰ The applicant based his arguments in part on the relevant "international human rights standards", deriving from both treaty law (Articles 7 and 10 of the ICCPR and General Comment No 21 of the Human Rights Committee) and non-treaty instruments (UN Standard Minimum Rules for the Treatment of Prisoners¹⁶¹). While determining the extent of rights enjoyed by the applicant, the Court applied the various provisions of the Standard Minimum Rules, as well as the Body of Principles for the Protection of All

concern pre-trial detention).

¹⁵⁷ Eg Taipei High Administrative Court (ROC) Judgment, 99-Su-1677 (28 June 2012) (concerning housing rights and forced evictions); Taipei High Administrative Court (ROC) Judgment, 99-Su-1999 (7 April 2011) (concerning children's freedom of expression).

¹⁵⁸ Eg Supreme Court (ROC) Judgment, 97-Tai-Kang-707 (3 October 2008) (concerning pre-trial detention); Supreme Court (ROC) Judgment, 97-Tai-Shang-3508 (24 July 2008) (concerning the rights of defendant in criminal proceedings).

¹⁵⁹ Eg Taipei High Administrative Court (ROC) Judgment, 101-Su-1318 (11 April 2013).

¹⁶⁰ The "freedom of privacy of correspondence" is provided in Article 12 of the ROC Constitution. According to Judicial Yuan Interpretation No. 631, the purpose of this provision "is to protect the people's right to choose whether or not, with whom, when and how to communicate and the contents of their communication without arbitral invasion by the State and others". Judicial Yuan (ROC), Judicial Yuan Interpretation No. 631 (20 July 2007) <http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=631> accessed 20 August 2014.

¹⁶¹ 'Standard Minimum Rules for the Treatment of Prisoners' First United Nations Congress on the Prevention of Crime and the Treatment of Offenders (22 August-3 September 1955) (30 August 1955) UN Doc A/CONF/611, Annex I.

Persons under Any Form of Detention or Imprisonment¹⁶² adopted by the UN General Assembly in 1988. These instruments in and of themselves might not carry binding force under international law, it has been argued that the principles derived from Standard Minimum Rules have obtained customary status,¹⁶³ and many provisions of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment aim to “set forth, and sometimes develop, principles already recognized under customary law”.¹⁶⁴ Although it was not expressly indicated in the judgment of the Taipei High Administrative Court that these principles carried binding force as a matter of domestic law, the Court indeed used these principles to examine the proper treatment that the prison authorities were obligated to provide.

Overall, the courts in Taiwan rarely apply general international human rights law in their judgments, and when rules other than human rights treaties are invoked, references are usually vague and do not point to the specific sources of rights. However, the lack of judicial practice does not necessarily suggest that the courts consider general international human rights law inapplicable. Although there is no constitutional or statutory provision authorising the application of general international law, past judicial decisions suggest that such rules do indeed form a part of the domestic legal system. One of the earliest cases on this issue was decided by the Shanghai Provisional Court in 1927. As the Court ruled on the issue of jurisdiction, the “custom of public international law” concerning jurisdiction was applied to determine the immunity enjoyed by “the state-

¹⁶² Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UNGA Res 43/173 (9 December 1988) UN Doc A/RES/43/173.

¹⁶³ Roger S Clark, *The United Nations Crime Prevention and Criminal Justice Program: Formulation of Standards and Efforts at Their Implementation* (U Pennsylvania P 1994) 99.

¹⁶⁴ UNCHR, ‘Report of the Working Group on Arbitrary Detention’ (12 January 1993) UN Doc E/CN.4/1993/24.

owned navigation organ of a friendly country”.¹⁶⁵ In a number of other cases, courts have also applied principles of international law in their judgments concerning jurisdiction¹⁶⁶ and immunity.¹⁶⁷ In 1994, a questionnaire from the International Law Association was forwarded by its Chinese (Taiwan) Branch to the Judicial Yuan, and question 10 of the questionnaire asked how courts in Taiwan ascertain the “validity, content, scope and manner of application” of a rule “deriving from custom, or otherwise from general international law”.¹⁶⁸ In response, the Judicial Yuan stated that “parties involved have the burden to prove [the validity, content, scope and manner of application of the international custom] and the court is also competent to initiate an investigation therefor”.¹⁶⁹ The Judicial Yuan further indicated that, to ascertain a rule of general international law, “the court can refer to the legal opinion of the International Court of Justice, other courts in the Republic of China, executive branches and domestic and foreign scholars”.¹⁷⁰ This response suggests that courts in Taiwan in fact can apply general international law in their judgments, and thus general international human rights law should also be considered as applicable law in Taiwan’s domestic legal system.

V. Possible Concerns for Acknowledging the Applicability of International Human Rights Law to the ROC (Taiwan)

¹⁶⁵ Shanghai Provisional Court (ROC) Judgment, 15-Min-Shi-4885 (30 September 1927), translated in 40 ILR 84.

¹⁶⁶ Eg Taipei District Court (ROC) Judgment, 54-Su-2107 (8 November 1965), translated in 40 ILR 56 (invoking a “principle generally recognized by international law” concerning fictitious territory).

¹⁶⁷ Eg Taipei District Court (ROC) Judgment, 90-Su-387 (3 June 2003) (invoking rules of “customary international law” concerning immunity of a diplomatic mission of a foreign State); Taiwan High Court (ROC) Judgment, 92-Shang-Yi-875 (17 February 2004) (upholding the previous case on the basis of “international practices and customs”).

¹⁶⁸ ‘Responses of the Chinese (Taiwan) Branch of the International Law Association and the Judicial Yuan of the Republic of China to the Questionnaire of the International Law Association Regarding the International Law Practice in the Municipal Courts of the Republic of China’ (1994-95) 13 Chinese YB Intl L & Affairs 168, 192.

¹⁶⁹ *ibid* 202.

¹⁷⁰ *ibid*.

As discussed in previous chapters, the potential concerns for acknowledging the applicability of conventional and general international human rights law to unrecognised entities include the risks of improper legitimisation or implied recognition, lack of ability to protect and fulfil human rights, and the danger of downgrading standards of protection. In relation to the latter two concerns, it is clear that such concerns are not valid for the case of Taiwan. As emphasised in this chapter, the degree of exclusive territorial control exercised by the Taiwanese government and its effective governance and State-like functions suggest that it is the entity that is best in place to respect, protect, and fulfil human rights in Taiwan. The government's efforts in incorporating international human rights treaties into the domestic legal system further demonstrate that Taiwan has the required ability. In terms of the danger of downgrading standards of protection, as explained in Chapter 3, this concern usually applies in situations where bilateral agreements incorporating human rights elements contain lower standards of human rights. In the case of Taiwan, the attempts to participate in treaties have only been aimed at multilateral human rights treaties, thus eliminating the concern of downgrading standards.

Turning to the risk of improper legitimisation and implied recognition: although there has been concern that conclusion of bilateral agreements with Taiwan may imply recognition,¹⁷¹ similar concerns have not been voiced in relation to the participation in international human rights treaties or the applicability of general international human rights law. With the exception of the UN's rejection of Taiwan's attempt to participate in the ICCPR, the ICESCR, and the CEDAW, the attitudes of other members of the international community towards the applicability of international human

¹⁷¹ Attix (n 18).

rights law to Taiwan remains unclear. As mentioned earlier,¹⁷² even though the EU occasionally comments on the human rights conditions in Taiwan and seems to support the incorporation of the two Covenants into Taiwan's domestic law,¹⁷³ it has not explicitly commented on the applicability of these treaties to Taiwan. Without knowing the positions of other States and international actors on this issue, it is difficult to unequivocally conclude whether the theoretical concerns of legitimisation and recognition are valid in relation to Taiwan. Nevertheless, as argued in previous chapters, even if these concerns exist, they are often outweighed by the need to safeguard human rights by imposing human rights obligations on unrecognised entities. The same rationale should equally apply to the case of Taiwan, and such concerns should not bar the application of international human rights law to Taiwan.

VI. Conclusion

The ROC (Taiwan) remains a peculiar case under international law. While it displays State-like features and satisfies the criteria of statehood, it receives limited recognition from other States. While the international legal status of Taiwan remains disputed, it is clear that Taiwan fits the definition of an unrecognised entity as adopted in this thesis. This chapter has explored the applicability of international human rights law to Taiwan by examining the practice concerning Taiwan in terms of both conventional and general international human rights law and applying arguments put forward in previous chapters. In terms of human rights treaties, although the ROC has signed and ratified more than twenty human rights treaties prior to 1970, after its de-recognition as a result of UN General Assembly Resolution 2758, the validity of the ROC government's signatures and

¹⁷² See text accompanying n 1.

¹⁷³ European Union - European External Action Service (n 1).

ratifications became disputed. While some practice suggests the ROC's signatures and ratifications were no longer recognised, this thesis argues that those human rights treaties should continue to apply on the basis of the principle of continuity of international human rights obligations. After 1970, Taiwan was isolated from inter-governmental organisations and excluded from participation in international treaties, and it was only until recent years has Taiwan formally attempted to accede to or ratify international human rights treaties. Although these attempts were unsuccessful, this thesis argues that it is necessary, from the point of view of the international community, to acknowledge Taiwan's capacity to participate in these treaties since Taiwan is the entity that is best placed to implement the obligations provided in them. In addition, Taiwan has expressed its consent to be bound by these treaties by submitting instruments of ratification/accession, issuing unilateral declarations, and incorporating these instruments into the domestic legal system. In short, the treaties ratified by the ROC government prior to its de-recognition and the treaties that it attempts to adhere to in the recent decade should all be applicable to Taiwan.

Turning to general international human rights law, although, compared to human rights treaties, less practice is found at both the international and domestic levels, this thesis argues that the lack of practice should not be interpreted as suggesting that general international human rights law does not apply to Taiwan. On the contrary, the lack of practice and attention further demonstrates the need to examine the human rights situations in Taiwan in light of general international human rights law and to impose corresponding obligations on Taiwan. This is necessary in order to ensure that the duty-bearer is in fact an entity that is capable of respecting, protecting, and fulfilling the rights of individuals living in Taiwan.

CHAPTER 6

CONCLUSION

As explained at the outset, the aim of this thesis is to explore whether and on what basis international human rights law applies to unrecognised entities, and especially to the ROC (Taiwan). Chapter 1 set out the background of these research questions and considered the approach to be taken to answer those questions. Issues regarding sources of international law in general, and international human rights law in particular, were discussed, and it was then established that this thesis would examine two groups of law: international human rights treaties and general international human rights law, separately.¹ With the research questions identified and the framework of research determined, Chapter 1 presented the methodology and structure that would be adopted to answer the research questions.

Chapter 2 explored the notion of statehood and theories concerning State recognition under international law. In this connection, the traditional criteria of statehood (permanent population, defined territory, government, and the capacity to enter into relations with other States) and other proposed criteria (independence, permanence or stability, willingness and ability to observe international law, legality of establishment, self-determination, and recognition) were examined.² While there is little doubt that the traditional criteria reflect customary international law and are considered as prerequisites for an entity to obtain statehood, the same cannot be said in relation to the additional criteria. In many cases, the additional criteria are used as factors for the evaluation of whether the traditional criteria of statehood are fulfilled, rather than as standalone

¹ See Chapter 1, Section II.A.

² See Chapter 2, Section II.A.

criteria that are required for the purpose of determining statehood.³ Among the proposed additional criteria is the notion of recognition. Considering that recognition, or rather the lack of recognition, is an important aspect of the concept of an “unrecognised entity”, Chapter 2 analysed the theories and effect of recognition.⁴

Considerations of international human rights law contributed to the conceptualisation of “unrecognised entities”.⁵ While the acts of many non-State actors might influence individuals’ enjoyment of human rights, the thesis seeks to focus on those entities whose relationships vis-à-vis rights holders resemble those between States and individuals living in their territories. Building on the discussions of the various statehood criteria, Chapter 2 defined “unrecognised entities” as entities that fulfil the traditional criteria of statehood, or the “Montevideo criteria”, and achieve *de facto* independence but are not generally recognised as States by the international community. Based on the definition provided in this chapter, the criteria of unrecognised entities can be broken down into three aspects: a) the Montevideo criteria of statehood; b) *de facto* independence; and c) a lack of general State recognition. While the interpretation of the Montevideo criteria in this context is more or less similar to the context of statehood,⁶ the other two criteria deserved further elaboration. Regarding the notion of *de facto* independence, this thesis requires that unrecognised entities must not be subjected to the “effective control” of other States or entities.⁷ The “effective control” test, originally adopted by the ICJ in the *Nicaragua Case*, is used here to exclude entities whose acts, including those that may affect the enjoyment of human rights, can be attributed to

³ See Chapter 2, Section II.A.2.

⁴ See Chapter 2, Section II.B.

⁵ See Chapter 2, Section III.A.

⁶ See Chapter 2, Section III.B.1.

⁷ See Chapter 2, Section III.B.2.

another State. In those cases, the third State may be held liable for the violations of human rights, and the study of the obligations of the entity subjected to its control is no longer necessary. Regarding the final criterion, the lack of general recognition, the thesis provided a number of indicators as to whether an entity has received general recognition. In the assessment of whether an entity fits the definition of unrecognised entities, the attitudes of other States and international organisations should be taken into consideration. The Holy See, the Cook Islands, and Palestine were provided as examples as entities excluded from this thesis since according to existing practice, they would be allowed to participate in international human rights treaties if they express the intention to do so.⁸

Chapters 3 and 4 respectively examined the application of international human rights treaties and general international human rights law to unrecognised entities. Chapter 3 began by analysing the notion of treaties under international law and then defined a treaty as “a consensual agreement concluded between two or more subjects of international law in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”.⁹ The examination of whether unrecognised entities may bear obligations under international human rights treaties was conducted in two stages: firstly regarding the capacity to conclude or participate in treaties (treaty-making capacity), secondly concerning possible means to express consent to be bound by human rights treaties. In the first stage, this chapter studied the treaty-making capacity of States, international organisations, insurgents, NLMs, and entities created to administer territories, and the rationale behind granting them such

⁸ See Chapter 2, Section III.B.3.

⁹ See Chapter 3, Section I.

capacity. The treaty-making capacity of States appears to stem from the increasing importance of treaties in the international legal order and the role of States as the principal actor at the international level.¹⁰ Regarding international organisations, different schools of thought were proposed as the basis for their treaty-making capacity. Some argued that treaty-making capacity of an international organisation derived from the delegation of authority of the member States of that organisation. Others considered international legal personality as the basis of international organisations' treaty-making capacity. While both schools have met with criticisms, this thesis recalled the ICJ's view in the *Reparation Advisory Opinion* concerning the UN,¹¹ that the nature and capacities of a subject of international law "depends upon the needs of the community" and the "requirements of international life".¹² Among the other non-State actors whose treaty-making capacity were examined in this chapter, necessity, or the needs of the international community, also serves as the basis of treaty-making capacity of insurgents.¹³

Of the rationales that justify the possession of treaty-making capacity of States and various categories of non-States actors, this thesis argued that necessity can also be used to explain why the capacity of unrecognised entities to conclude or participate in international human rights treaties should be acknowledged. Three potential sources of necessity were presented and examined. Firstly, it is necessary to allow unrecognised entities to conclude or participate in international human rights treaties since they are the only entities that are in place to respect, protect, and

¹⁰ See Chapter 3, Section II.A.2.

¹¹ See Chapter 3, Section II.B.2.

¹² *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 176.

¹³ See Chapter 3, Section II.C.2.

fulfil the rights provided in those treaties.¹⁴ This is especially true considering the effective and exclusive control of an unrecognised entity over its territory. Secondly, the necessity for the continuity of international human rights treaty obligations may support acknowledging treaty-making capacity of unrecognised entities. To examine whether there is a principle of continuity in terms of international human rights obligations, this chapter analysed rules concerning denunciation of international human rights treaties and State succession in respect of such treaties.¹⁵ While the first set of rules do not provide a satisfactory basis for the principle of continuity of obligations, the second set of rules suggest that an unrecognised entity should be allowed to have the capacity to assume the obligations under the human rights treaties undertaken by the State that formerly exercised effective control of the territory in question. Acknowledging the unrecognised entity's capacity in this regard is necessary in order to guarantee the enjoyment of rights already acquired by the people living in that territory. The last potential source of necessity is the notion of international legal personality.¹⁶ This approach is problematic for many reasons. The determination of whether an entity possesses international legal personality is a difficult task as there is no agreed definition of international legal personality. More importantly, the relationship between international legal personality and capacities to act at the international level remains disputed, and not all international legal persons possess the same capacities. In other words, even if an entity is thought to possess international legal personality, it does not mean that the entity would thus possess treaty-making capacity. Therefore, the notion of international legal personality alone does not justify the necessity

¹⁴ See Chapter 3, Section III.A.1.

¹⁵ See Chapter 3, Section III.A.2.

¹⁶ See Chapter 3, Section III.A.3.

to allow unrecognised entities to conclude or participate in international human rights treaties. The chapter also examined four possible reasons behind other States' reluctance of acknowledging unrecognised entities' capacity to conclude international human rights treaties.¹⁷ Overall, there are reasonable grounds to support the necessity of allowing unrecognised entities to conclude or participate in international human rights treaties. The potential concerns either only exist in theory or bear little relevance when examined in light of the actual practice involving unrecognised entities.

After establishing that the treaty-making capacity of unrecognised entities in relation to international human rights treaties should be acknowledged, this chapter moved on to present three possible means for these entities to express consent to be bound: conclusion of bilateral human rights treaties, official participation in multilateral human rights treaties (through the submission of signatures, accession, and ratification, etc), and unilateral expression of consent to be bound by such treaties.¹⁸ This chapter provided examples of the first means, explained the challenges of the second means, and presented the third means as an alternative to official participation since official participation of unrecognised entities is only possible if existing States parties agree to it. In short, this chapter argued that not only should unrecognised entities be deemed as possessing the capacity to conclude or participate in international human rights treaties, there are ways available for these entities to express their consent to be bound. If an unrecognised entity in fact expresses such consent, it should be considered bound by the treaty in question.

¹⁷ See Chapter 3, Section III.B.

¹⁸ See Chapter 3, Section IV.

Chapter 4 explored the application of non-treaty rules of international human rights law, or “general international human rights law”. In order to answer the question whether unrecognised entities are bound by general international human rights law, this chapter looked at two aspects: a) the nature and authority of different types of general international law (international custom, general principles of law, and peremptory norms); and b) its applicability to certain categories of non-State actors. With the first aspect, it was acknowledged that the theory of consent has long been invoked as the basis of authority of international custom. However, as shown in this chapter, this theory does not provide a satisfactory justification for the prohibition of “subsequent objectors” and for barring new States from opting out of existing customs.¹⁹ Thus, an alternative theory of “social necessity” was proposed,²⁰ arguing that there are rules that are necessary conditions of the international society. According to this theory, these rules exist on the basis of justice and common interest and must be binding because members of the international community consider “order and not chaos is the governing principle of the world in which they have to live”.²¹ The notion of necessity can also be observed in discussions concerning the basis of authority of general principles of law²² and peremptory norms.²³

Turning to the second aspect, this chapter examined the applicability of general international human rights law to international organisations, armed groups, and entities created to administer territories.²⁴ International jurisprudence, the work of international bodies, especially those within the UN, and scholarly writings were analysed to see whether

¹⁹ See Chapter 4, Section II.A.2.

²⁰ See Chapter 4, Section II.A.2.c.

²¹ Andrew Clapham, *Brierly's Law of Nations* (OUP 2012) 53.

²² See Chapter 4, Section II.B.2.

²³ See Chapter 4, Section II.C.2.

²⁴ See Chapter 4, Section III.

these non-State actors were bound by general international human rights law and what bases were giving to justify its applicability. Many of the bases in fact relate to the State-like characteristics of those actors (such as control over territory, structure and organisation of government, etc). Following the introduction of practice related to the applicability to unrecognised entities,²⁵ this chapter illustrated how the notion of necessity can be invoked to support the application of general international human rights law to unrecognised entities.²⁶

Building on what was developed in Chapters 2 to 4, Chapter 5 explored the application of international human rights law to the ROC (Taiwan). The chapter first tackled the issue of the international legal status of the ROC in light of the criteria of statehood and those of unrecognised entities introduced in Chapter 2. Although Taiwan fulfils all of the traditional criteria of statehood and most of the additional criteria, its status remains controversial.²⁷ Still, since Taiwan fits the definition of unrecognised entities provided in this thesis,²⁸ the remainder of the chapter examined the case of Taiwan in light of the arguments supporting the application of international human rights law in Chapters 3 and 4, as well as the potential concerns.²⁹ In terms of treaties, this chapter studied the ROC government's participation in international human rights treaties prior to its de-recognition, the impact of the de-recognition on the signatures, accessions, and ratifications by the ROC, as well as its attempts to participate in international human rights treaties in recent years.³⁰ Considering the status of Taiwan and the practice described in this chapter, it is necessary to acknowledge that Taiwan has the capacity to participate

²⁵ See Chapter 4, Section IV.A.

²⁶ See Chapter 4, Section IV.B.

²⁷ See Chapter 5, Section II.B.

²⁸ See Chapter 5, Section II.C.

²⁹ See Chapter 5, Sections III-V.

³⁰ See Chapter 5, Section III.A.

in international human rights treaties. Firstly, acknowledging such capacity echoes with the principle of continuity of obligations, in terms of the treaties in which the ROC government participated prior to its de-recognition. Secondly, Taiwan is the only entity that is able to implement the rights provided in international human rights treaties in its territory. Furthermore, Taiwan has expressed its consent to be bound by a number of international human rights treaties through the submission of instruments of ratification/accession, unilateral declaration, and incorporation of human rights treaties into the domestic legal system. In sum, the international human rights treaties that the ROC government participated in prior to its de-recognition and those it attempted to participate in reason year should all be considered applicable to Taiwan. As for general international human rights law, there has been less practice at both international and domestic levels concerning its applicability to Taiwan. However, this chapter argued that the lack of practice does not mean Taiwan is not bound by general international human rights law. Instead, it signals the need for more attention and monitoring for the implementation of general international human rights law in Taiwan, and only through holding Taiwan as the duty-bearer can the objective of respecting, protecting, and fulfilling the rights of individuals living in Taiwan be achieved.

Although Taiwan is the case study of this thesis, it is envisaged that the arguments developed here apply to other unrecognised entities as well. While different backgrounds and circumstances contribute to the lack of recognition and disputed status of each unrecognised entity under international law, the rationale behind acknowledging the applicability of international human rights law to unrecognised entities – necessity – is firmly based on their common features. While there is limited practice

actually explicitly admitting that unrecognised entities may possess obligations under international human rights law, this thesis argues that the theories and practice regarding international human rights law and non-State actors provide reasonable bases to justify the acknowledgment of its application to unrecognised entities. It should be noted that such an acknowledgement does not imply that unrecognised entities have the capacity to enjoy rights and bear obligations under other fields of international law. Most of the arguments supporting the application of international law to unrecognised entities are grounded upon the characteristics of international human rights law and are not easily transferrable to other areas.

Looking beyond unrecognised entities, it might also be possible to use the test of necessity to assess the applicability of international human rights law to other non-State actors. After all, the test was first invoked by the ICJ to determine the nature and capacities of subjects of international law, and in particular international organisations. Discussions concerning the treaty-making capacity and the applicability of general international human rights law to non-State actors in this thesis also reveal that the rationale behind acknowledging such capacity and applicability echo the needs of the international community. Furthermore, as not all actors in a legal system possess identical ranges of capacities and bear the same scope of obligations, the necessity test may also help to ascertain the extent of obligations of various categories of non-State actors under international human rights law. Although the test was introduced 65 years ago, it remains a useful tool that demonstrates how rules of international law can be flexibly interpreted to accommodate emerging new actors and how the international legal order may evolve to meet the challenges brought about by such actors.

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